NAZI CRIMINALS BEFORE WEST GERMAN COURTS

BY JADWIGA GORZKOWSKA
AND ELŻBIETA ŻAKOWSKA

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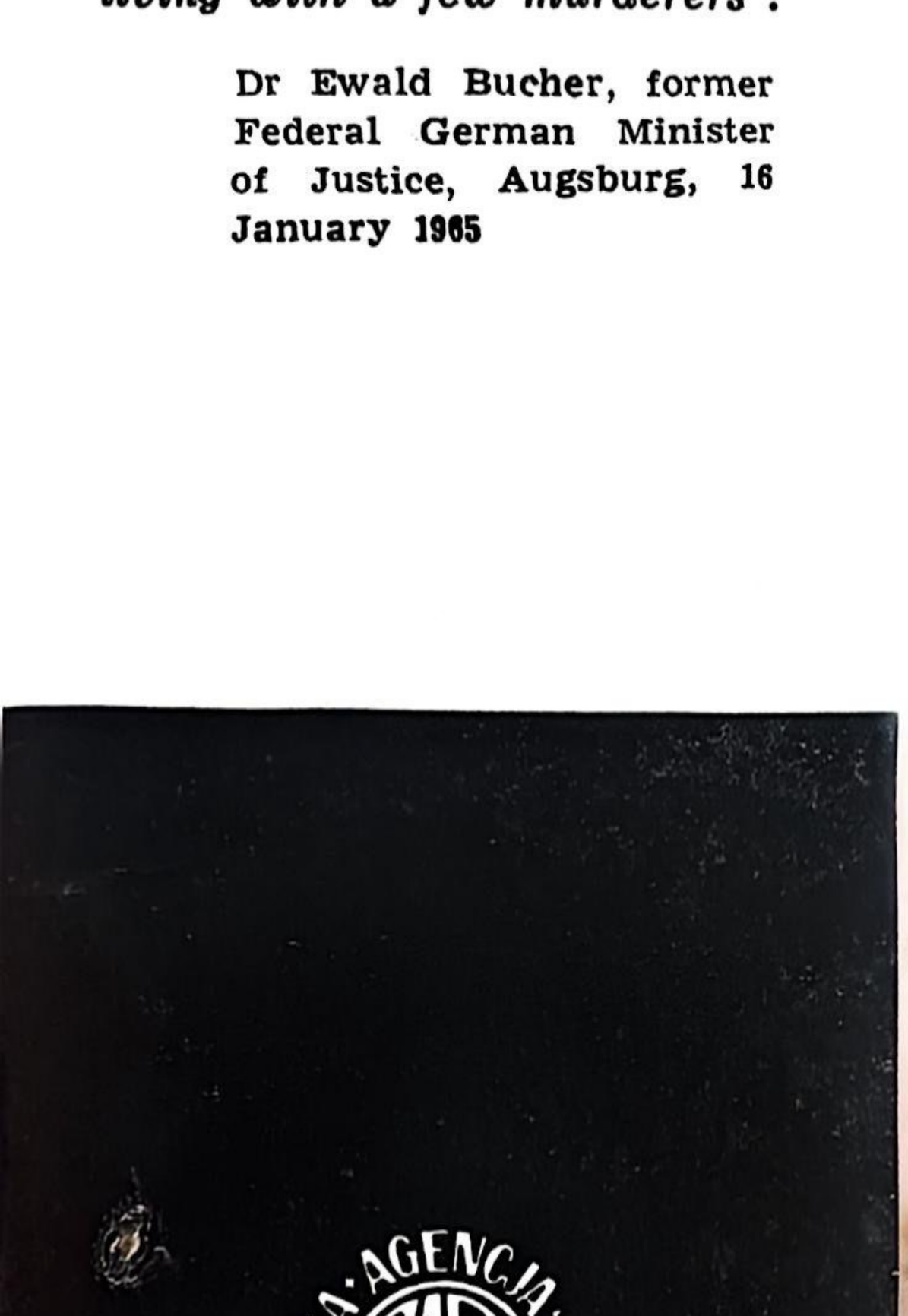
"The three Allied Powers will pursue [the guilty] to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done".

Moscow Declaration by the Governments of the U.S.S.R., the U.S.A. and Great Britain, 30 October 1943

"We must accept that fact that we may have to go on living with a few murderers".

Dr Ewald Bucher, former Federal German Minister of Justice, Augsburg, 16 January 1965



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Foreword
by
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FOREWORD

Was it not Carlyle who exhorted both oblivion and memory to be wise? By which he undoubtedly meant that great wisdom was needed to find the blend of oblivion and memory appropriate to the actual occurrence. This is probably nowhere more true than in the domain of foreign politics where the politician and the philosopher alike stand gloomily hesitating between "let bygones be bygones" and "lest we forget".

As regards the question of Nazi crimes, the case of memory v. *forgetfulness can be considered either from the legal or from the politico-moral point of view. Although a lawyer myself, I prefer to adopt here the latter attitude (since the authoresses of the present study have dealt with the former); I think that this is very useful vantage ground for a clear vision of the problem needs some recommendation.*

Wars had never been devoid of atrocities, but it was reserved for the Nazis to expand into a fully-fledged system what before had been only incidents. Compared with the Nazi technique, the exploits of the most ruthless condottieri *of past epochs seem amateurish work. The performances of Hitler and his associates might be termed an industrial rev-*

olution in the production of war horrors. They stand out still in another respect: they were neither wholly dictated by strategic objectives nor purely the outcome of a boundless lust for destruction. They grew organically out of a doctrine *which held that whatever stood in the path of the attainment of greater power by the German State was useless weed and ought to be rooted out or (the word seems very appropriate in connection with the Nazi record) incinerated.*

This doctrine had a long tradition behind it, even though the instruments used by the Third Reich were strikingly novel. At the beginning of World War II the expression L'Allemagne éternelle *circulated very widely in France. It was not the real eternity which was meant. The expression indicated the scarlet thread which, from the time of Frederick the Great through Bismarck and Wilhelm II, had twisted its way through the history of the Prussian State: an explosive urge to force that State — or the Prussia-dominated organization of German States — into the forefront of European powers. This urge was fostered in home politics by intoxicating the people with a* Herrenvolk *vision and was, for the benefit of the outer world, accompanied by a flourish of the "mailed fist".*

(This statement is in no sense intended to cast any doubt on the morals and peaceableness of the German people at large, to whom only our best wishes. It is nevertheless a fact that these virtues somehow failed to prevail against the onslaught of nationalist propaganda which reached its peak with the Nazi maxim that everything that served the German nation was legal, while everything that harmed it was illegal.) [1]

[1] "Alles was dem Volke nützt, is Recht, alles, was ihm schadet, is Unrecht". Hans Frank, *Nationalsozialistisches Handbuch für Recht und Gesetzgebung*, Munich, 1935, p. xiv.

After World War I, no great shrewdness was needed on the part of the victors to perceive that, without thoroughgoing limitations of armaments, there was no real guarantee that aggressive designs of future leaders of the German State would not celebrate their revival. Hitler skilfully exploited the indolence of the former Allies — and the rivalry between them — to break the clauses of the Versailles Treaty restricting German armaments and to build up the armoury of the Nazi State. Thus, in 1939 the world witnessed a reappearance of l'Allemagne éternelle *which was as much more formidable than her former incarnations as the Nazi determination to conquer was more absolute and the means Hitler was prepared to use more deadly.*

Let us concede at once that to talk about "eternal Germany" is an exaggeration but is not entirely false. The Nazis did not invent either the passage through Belgium or the shooting of hostages. They carried only to its ultimate conclusion an old doctrine which excused any undertaking for the extension of the German State and condoned any act committed on military orders.

In 1945, the victors decided not to repeat the error of their predecessors who in the years after 1918 bungled so pitiably the promised prosecution of war criminals. They considered that in view of the crushing defeat of the aggressors the rooting out of the traditional doctrine, which had for so long underlain the arrogant bidding for German ascendancy and had strewn the German methods of warfare with horrors, was at least as important as the deprival of Germany of the physical possibility of waging war. That was the origin of the International Military Tribunal in Nuremberg and of other judicial proceedings against Nazi war criminals.

At the end of 1943 Churchill, Roosevelt and Stalin had promised in their Moscow Declaration that

> *most assuredly the three Allied Powers will pursue [the guilty] to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.*

Despite the slightly declamatory tone, the words "to the uttermost ends of the earth" fitted exactly the gasping indignation of those who had to bear the impact of the hell let loose by the Nazis. It was not sheer vindictiveness that dictated them (as more or less masked defenders of what Hitler stood for would have it); they reflected the conviction that, unless that basic doctrine (or shall we call it "ideology"?) was duly branded in criminal proceedings, there would be no security for nations wanting to enjoy peace, freedom and civilization.

The opening speeches of the chief prosecutors in the Nuremberg trial of major German war criminals still make very good reading and it is to be regretted that they are so seldom referred to. Every one of them contained a characteristic remark.

1) The British chief prosecutor began his speech by quoting what Hitler had said at a conference with military leaders shortly before the war:

> *I shall give a propagandist cause for starting the war, never mind whether it be true or not. The victor shall not be asked later on whether we tell the truth or not. In starting and making a war not the right is what matters but victory — the strongest has the right.*

That was the power-knows-no-fetters part of the "ideology". Of course, the power to be used for the benefit of the German State.

2) The Soviet prosecutor reminded the Tribunal of Hitler's words quoted by Hermann Rauschning:

> *I am freeing men from the wearisome restrictions of the mind, from the dirty and degrading self-mortifications of a chimera called conscience and morality, and from the demands of a freedom and personal independence which a very few enjoy.*

That represented the ingredient by which the "ideology" endowed the commanders with the power to accord plenary indulgence to whatever was committed on their orders.

3) The United States chief prosecutor, opening his case, said:

> *The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.*

And then, pointing at the "twenty-odd broken men" who sat in the dock, he said:

> *Merely as individuals their fate is of little consequence to the world. What makes this inquest significant is that the prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust.*

That was a reminder of the monstrous crop to which the "ideology" was inevitably conducive, if it was allowed to hibernate until more favourable times.

4) The French chief prosecutor, in his opening speech, appraised exactly the Nazi "ideology" — heir to that resilient doctrine which continually reappeared through epochs and was to be brought by the Nazis to its most deadly peak. He said:

I propose to-day to prove to you that all this organized and vast criminality springs from what I may be allowed to call a crime against the spirit. I mean a doctrine which, denying all spiritual, rational and moral values by which the nations have tried, for thousands of years, to improve human conditions, aims to plunge humanity back into barbarism [...], a diabolical barbarism, conscious of itself and utilizing for its ends all material means put at the disposal of mankind by contemporary science. This sin against the spirit is the original sin of National Socialism from which all crimes spring.

And he quoted from a Nazi periodical of September 1938:

The whole of the individual, body and soul, belongs to the Germanic nation and to the Germanic State.

Assembling these fragments of the opening speeches of the four chief prosecutors in Nuremberg we achieve, in a flash, a penetrating insight into the fact that Nazi criminality is at one with the inherited doctrine of attaining, on the international arena, a sweeping German superiority by all means, lawful or not, always in blind obedience to orders given by the German state authorities. Let us now bear this in mind — now, when we have reached the point at which the discussions over the application of the statute of limitations to Nazi crimes have spotlighted public attention in all countries on the problem.

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It is clear from the well-known Law No. 10 that, having destroyed the Nazi State, the victors expected the Germans to prove their intention to bury once and for all the dead "ideology".[2] *Thus, a crucial question arises: how can this*

[2] Article III of Law No. 10 provided that "In the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality or stateless persons" a German court might be the competent tribunal.

proof in the long run be given? And the answer is: not necessarily by the severity of the punishment inflicted in German courts on Nazi war criminals (although, of course, the sentences ought not to be ludicrous, as some have already been), but certainly by the length of time *during which the conspicuous anathematizing of the "ideology" is a part of German home policy. For just so long as the Germans continue to proceed against the Nazi criminals, for so long do they show their abhorrence of the "sinister influences" which may still be "lurking". The moment they discontinue the prosecutions, they must needs become exposed to the suspicion that* l'Allemagne éternelle *may once more awake and stretch its limbs.*

The German Democratic Republic has repudiated the limitation of trials of war criminals. In the German Federal Republic, it was officially announced in November 1964 that, 20 years being the longest term for criminal prosecutions according to the German penal code (dating from 1871), the prosecution of Nazi criminals would be terminated by May 1965. Thus, wrongs which "have been so calculated, so malignant and so devastating that civilization [...] cannot survive their being repeated" were put by the authorities of West Germany on the same footing as common crimes; they were not deemed to constitute a category by themselves. The announcement implied that in the spring of 1965 the Fluch der bösen Tat — *the curse of the evil deed — would cease to jar upon the conscience of appropriate political circles in the German Federal Republic.*

However, on 10 March 1965, the Bundestag, after a lively debate, referred to its legal committee for consideration three proposals concerning the extension of the time limit on the prosecution of Nazi murderers. Thus, hopes rose. It appeared that the outburst of protests in the world at large,

as well as certain manifestations of indignation within the Federal Republic, had had a sobering effect. Several members were quite outspoken in denouncing the discontinuance of prosecutions.

In reply to them, the then Federal Minister of Justice, Dr Bucher, flaunted arguments based on legal issues and even on obstacles allegedly set by constitutional provisions; but, his arguments could only convince people who fervently desired to be convinced.

It sounds rather strange when one hears that the prosecution of the foulest criminals known to history can be looked upon as illegal or unconstitutional. This aspersion at least on the Basic Law of the Federal Republic would be entirely unfounded. Article 103 of the Law, now often invoked in Bonn by adversaries of the statute of limitations being extended as far as Nazi murderers are concerned, states that "an act may be liable to punishment only if it carried a statutory penalty prior to its commission". One can only wonder how this provision — common to the penal law of all civilized countries — could obstruct the prosecution of war murderers after 8 May 1965. Murder had certainly been liable to punishment in Germany before the Nazis committed it wholesale as a means of carrying out their criminal policy, and the article in question cannot, also most certainly, be interpreted as including a guarantee to any murderer that only for twenty years would he have to live in fear of being brought to justice.

On 25 March, the legal committee reported. By a majority of almost four to one the Bundestag decided to continue for a bare four and a half years the prosecution of those war murderers who had not acted under orders. Thus, an overwhelming majority of West German political representatives

rejected an outright condemnation of the aggressive ideology of which the Nazis had been the most consistent and ruthless exponents. Not only did they choose the meanest manner of evasion, adopting the shortest of the three suggested terms of extension, but by proposing to exclude from further prosecutions all those who might plead to have acted under orders, they stultified the whole measure. In the Third Reich, everybody had been under some sort of orders — yet, only those who liked to be ordered to murder became war murderers. And they precisely would now be offered a way of escape.

It does not seem that there is anything in the recent decision West Germany's politicians can be proud of. It is quite in tune, on the other hand, with the eagerness displayed in this year's celebrations of the 150th anniversary of the birth of Prince Bismarck — the "Iron Chancellor", the champion of German unity "by blood and steel" and great believer in power politics.

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The facts collected and commented upon in the book by Miss Gorzkowska and Miss Żakowska make it imperative to ask several questions.

Why should have the German Federal Government worked so hard to free itself from the burden of prosecuting Nazi criminals? Why should it have been unwilling to demonstrate — by continued trials and judgments — that it did not desire the old creed to rear its head again? Why should it have wanted to grant the country's citizens a dispensation from being reminded of the results of the "ideology"?

There seems to be no answer to these questions except the suspicion that ruling circles in the Federal Republic are loth to be reminded of the fact that they are shielding camouflaged Nazis. There was some reason for embarrassment when men with a very bad record have in the past been disclosed among personalities of high official standing. And only very reluctantly were they brought to bay by those who ought to have known better. The cessation of prosecutions would preclude the recurrence of any such cases — the possibility of people who served Hitler being found among present servants of the Federal Republic.

One more point demands attention. Lately, a small branch has grown on the tree of knowledge of crime and punishment. It is called victimology and is concerned with the part which the victim plays in the origin of different crimes. Its adherents also promote the idea that the State — besides assuming responsibility for the punishment of the wrongdoer — ought to feel bound to compensating the criminal's victim. By compensation, of course, is meant a money payment.

But here we are not considering monetary compensation. As regards the victims of Nazi crimes, moral *compensation may by now be of greater importance. After all, among those who suffered directly from those crimes, there are to be found more dead than survivors. They were outright murdered in blatant violation of law and the moral interests of mankind — slaughtered in gas chambers, secretly or publicly shot in mass executions of civilians, machine-gunned although they were prisoners of war. The only possible moral compensation to the millions and millions of those victims is the unflagging prosecution of the murderers themselves and of those who aided and abetted them.*

In fact, whatever reasons may be adduced to justify the limitation of prosecutions as regards ordinary *crimes, they are of no avail when crimes of the kind and magnitude of those committed by the Nazis are under consideration.*[3] *The sense of one's own guilt, or the guilt of others, as the case may be, is an essential part of morality. This sense must remain the more acute; and the more ready to react, the greater the reason for the feeling of guilt.*

We have seen how inextricably bound up with the Nazi crimes is the recurrent doctrine concerning the right of the German State to anything which it can grab by force of arms. In fact, the links of those crimes with that doctrine are so strong that any break in the prosecution of the guilt-ridden Nazis would necessarily become a loophole for the reappearance of tendencies all too well known.

It would be interesting to watch the parallelism in West Germany between, on the one hand, the decreasing desire to punish war criminals and, on the other, the increasing appetite for armaments and for participation in the nuclear weapons' pool. The periodically reiterated official declarations to the effect that the German Federal Republic makes no retreat from the claims to the 1937 eastern borders may also be considered in this connection.

However, dotting the i's and crossing the t's is not the purpose of a preface. I think my task may be concluded with the suggestion that the Federal Government's lack of enthusiasm for the continued prosecution of Nazi criminals reveals a state of mind which, when coupled with the steady expansion of West Germany's armed power, bodes no good.

[3] Note, by the way, that statutes of limitations are essentially a feature of civil law. Under English law, we read in the *Encyclopaedia Britannica*, V° Limitation, "for the prosecution of criminal offences generally there is no period of limitation, except where they are punishable on summary conviction".

The West German authorities have done their utmost to be, after May 1965, entirely free of any moral obligation incumbent upon them on account of past happenings, while at the same time they hasten with rearming and emphasize their claim to Germany's eastern frontiers of 1937. Nations who remember the past and take heed for their future cannot afford to see in this attitude anything but an augury.

MIECZYSŁAW SZERER

C H A P T E R I

THE RISE AND EXPANSION OF LEGISLATION AGAINST WAR CRIMES

Nazi crimes incorporate crimes against peace, war crimes, and crimes against humanity committed in the name, and in favour, of the Hitler Reich. Such crimes were listed in the Charter of the International Military Tribunal which formed part of the London Agreement of 8 August 1945 "Concerning Prosecution and Punishment of Major War Criminals", concluded by the Governments of the United Kingdom, the United States and the Union of Soviet Socialist Republics, and the Provisional Government of the Republic of France.

Article 6 (a) of the Charter described as crimes against peace the

> planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing.

War crimes were acts committed in violation of the laws and customs of war. Article 6 (b) of the Statute gave a number of instances:

> ...murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Crimes against humanity as listed in Article 6 (c) embraced:

> ...murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Notice of intention to prosecute Nazi crimes was served in a number of international acts from as early as 1942. The most important of these were:

1. The Declaration of 13 January 1942, signed by representatives of nine occupied countries [1] and promulgated at a conference in St. James's Palace, London. This document contained the first intimation that Nazi criminals would be brought to trial;

2. The Moscow Declaration of 30 October 1943, in which Great Britain, the U.S.A. and the U.S.S.R. announced, in the interests of the 32 United Nations, the elaboration of the procedure for trials of the major war criminals and extradi-

[1] Belgium, Czechoslovakia, France, Greece, Luxemburg, the Netherlands, Norway, Poland, and Yugoslavia. Nine other countries were represented by observers.

tion of other offenders to the countries in which their crimes were committed;

3. The Yalta Agreement of 11 February 1945, which reaffirmed the promise that German war criminals would be justly and swiftly punished, with a view to, among other reasons, deterring the German nation from any future aggression;

4. The London Agreement of 8 August 1945, concluded by the four Great Powers, on the prosecution and punishment of major war criminals; this incorporated the Charter of the International Military Tribunal.

These acts formed the basis of substantive and procedural law with regard to the major war criminals, at the same time stressing the obligation to extradite other offenders.

The technical preparations were entrusted to the United Nations War Crimes Commission formed on 20 October 1943 in London. The principal task of the Commission was to draw up a list of war criminals following investigations of charges lodged by the governments of particular countries. In addition, the Commission was to make a study of legal theory with a view to establishing the principles of work of the future war crimes tribunals.

The work of the Commission led to a definition of war crimes and crimes against humanity, responsibility for acts committed on orders, and responsibility springing from membership of criminal organizations. These recommendations were incorporated into the Charter of the International Military Tribunal under which the major war criminals were tried at Nuremberg.

The Charter, which comprised seven chapters, established the structure of the International Military Tribunal.

As Article 1 put it, the Tribunal was set up

> ...for the just and prompt trial and punishment of the major war criminals of the European Axis.[2]

The Tribunal consisted of four members, each with an alternate. Each of the signatories of the London Agreement appointed one member and one alternate (Article 2), none of whom could be challenged by the Prosecution, or by the defendants or their counsel (Article 3).

For the duration of each trial, the Tribunal members were to elect a President. In case the votes were evenly divided, the vote of the President was to be decisive, with the proviso that

> ...convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal (Article 4).

The Charter made provision for the appointment, if necessary, of other tribunals acting on the principles it embodied (Article 5), though this eventuality in fact never arose.

The International Military Tribunal was to try persons who, either personally or as members of criminal organizations, had committed crimes against peace, war crimes, or crimes against humanity, irrespective of the date of the crime. The Charter did not contain definitions of these crimes, presumably because of the problems involved in wording a comprehensive description. However, each was exemplified by a number of typical instances. Responsibility

[2] The Japanese war criminals were tried by a separate tribunal set up by a treaty dated 19 January 1946.

rested not only on the immediate perpetrators of a crime but also on the

> leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or conspiracy

who were to be held answerable

> for all acts performed by any persons in execution of such plan (Article 6).

Article 6 introduced the concept of criminal responsibility for "participating" in a crime, an apt formulation devised to fit the pattern of Nazi atrocities which usually consisted in the execution of certain acts which were but pieces in a broader criminal design.

The position of Head of State or responsible official did not free anybody from responsibility (Article 7). Acting under orders might, but need not, be treated solely as a mitigating circumstance; this was a matter for the discretion of the Tribunal (Article 8).

The provisions of Articles 6, 7 and 8 were drafted unambiguously and ruled out any recourse to the defence, later to be commonly employed, that execution of instructions excused an offender. They also stipulated the criminal responsibility of "accomplices" — the authors of the plans and those who played a part in passing them on to the men who actually committed the crime.

The Charter vested the Tribunal with powers to declare certain organizations criminal (Article 9), and empowered it to try defendants *in absentia* (Article 12). The Tribunal was to draw up its own rules of procedure which, however, must not be inconsistent with the provisions of the Charter (Article 13).

Each signatory of the London Agreement was to appoint a chief Prosecutor who was to consult with his colleagues on all major questions. Their principal duties were to examine witnesses, prepare a bill of indictment, and conduct the case in court (Article 15).

Defendants were to be assured: delivery, at a reasonable time before the trial, of the indictment in a language they could understand; the right to give evidence on their own behalf during the preliminary examinations and at the trial; translation of the proceedings into a language they could understand; the right to conduct their own defence or to have the assistance of counsel; and the right to present evidence at the trial in support of their defence, and to cross-examine witnesses called by the Prosecution (Article 16). Thus, the defendants were given full legal protection.

The procedure of the Tribunal was to be kept free of all unnecessary formalities. It was to admit as evidence anything that might be relevant to the case. Its verdict was final and not subject to review (Article 26). The Charter did not lay down a scale of sentences; the Tribunal might impose any penalty, including the death sentence, it thought just (Article 27). As an additional penalty, it might order the forfeiture of stolen property (Article 28).

The order to carry out a sentence was to be issued by the Allied Control Council for Germany which was entitled to alter the sentence, though not to the defendant's disadvantage (Article 29).

The International Military Tribunal's headquarters were set up in Berlin, and it was there that the bill of indictment against the major war criminals taken from the list prepared by the United Nations War Crimes Commission was presented to the court on 18 October 1945.

The defendant Robert Ley committed suicide before the trial began. Gustav Krupp was released on account of his physical and mental state which prevented his standing trial, and it was decided to try Martin Bormann *in absentia*.

The Tribunal heard the defendants, 33 witnesses for the prosecution, and 61 witnesses for the defence. The defence produced 143 affidavits by witnesses. In addition, a special investigating commission appointed by the Tribunal supplied it with protocols of the hearings of 101 witnesses for the defence, 1,809 affidavits by other witnesses, and 6 reports with evidence concerning criminal organizations. On the last-mentioned, the Tribunal itself heard 22 witnesses.

The trial of major Nazi criminals in Nuremberg lasted from 20 November 1945 to 1 October 1946.

On 30 September and 1 October 1946, the Tribunal delivered its verdict, convicting 19 of the defendants.

Hermann Goering, Joachim von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Fritz Sauckel, Alfred Jodl, Artur Seyss-Inquart and Martin Bormann (*in absentia*) were sentenced to death.

Rudolf Hess, Walther Funk and Erich Raeder were sentenced to imprisonment for life, Baldur von Schirach and Albert Speer to twenty years imprisonment, Konstantin von Neurath to fifteen years, and Karl Doenitz to ten years.

Hjalmar Schacht, Franz von Papen and Hans Fritzsche were acquitted. In a dissenting opinion, the Soviet member of the Tribunal considered that these latter defendants should also have been convicted, and that Hess should have been sentenced to death.

The Tribunal also drew up a list of criminal organizations which comprised:

a) the Leadership Corps of the National Socialist Party, consisting of the *Reichsleitung, Gauleitung* and *Kreisleitung,* the *Ortsgruppenleiters,* and the office heads in such party agencies;

b) the *Gestapo,* including all executive and administrative officials of *Amt* IV of the *RSHA* (Reich Main Security Office), the officials in other departments of the *RSHA* who had dealt with *Gestapo* matters, and all local *Gestapo* officials;

c) the SD *(Sicherheitsdienst)* — that is, all the officials of *Ämter* III, VI and VII of the *RSHA,* including all local representatives and agents, honorary or otherwise; and

d) the SS — all formations with the exception of the *Reiter-SS* (riding units) and individuals forcibly drafted into the organization.

In a dissenting opinion, the Soviet member contended that the Reich Cabinet, the General Staff and the German High Command should also have been declared to be criminal organizations.

The plans for further prosecutions before the International Military Tribunal, above all of the leading industrialists and financiers who collaborated with the Nazi régime, were scuttled by the British and the Americans. At a meeting of the Tribunal's counsel, held on 5 April 1946, the British representative declared that no further prosecutions could be staged before the Tribunal, because people were becoming wearied of the Nuremberg Trial, while the United States delegate said that his country was not wishing to contribute its share of the costs involved in the Tribunal's functioning. On 22 January 1947 the American Ambassador handed the other

signatories of the London Agreement a note in which he opposed any further meetings of the commission of prosecutors. The work of the International Military Tribunal was brought to an end.

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On 20 December 1945, the Allied Control Council for Germany, prosecuting the international acts already referred to, promulgated Law No. 10 concerning "Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity".[3] Its enactment served a double purpose. On the one hand, it was an "enabling order" further to the provisions of international law; on the other, it was a piece of legislation in its own right, regulating the action to be taken against Nazi criminals in Germany who fell outside the powers of the International Military Tribunal.

Article 1 stated that the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945 constituted an integral part of Law No. 10. This clause is of key importance to the interpretation of the whole Law, which can only be read in conjunction with the other two acts.

The Law proceeded to list four kinds of crime:

a) crimes against peace;
b) war crimes;
c) crimes against humanity;

(The description of each of these offences was followed by a number of instances. The wording followed sections a, b and c of Article 6 of the Charter of the International Military Tribunal.)

[3] *Official Gazette of the Control Council for Germany,* 31 January 1946.

d) membership of groups or organizations declared criminal by the International Military Tribunal.

The proper classification of the acts committed by Nazi criminals and their just punishment cannot be accommodated within the traditional framework of criminal law: this kind of criminal actions could not have possibly been foreseen by legislators who had not themselves come in touch with Hitlerism. Consequently, new contingencies had to be defined. This was reflected in section 2 of Article II of the Law, which added to the established concepts of direct commission, indirect commission, and accessoryship, the notion of participation (without which it would have been impossible to bring to trial those involved in such crimes as participation in mass murders [4]), consent to the commission of an offence, participation in plans or enterprises involving the commission of an offence, or membership of an organization connected with its commission.

These crimes were liable to the following penalties:

a) death;
b) imprisonment for life or a term of years, with or without hard labour;
c) fine, and imprisonment with or without hard labour, in lieu thereof;
d) forfeiture of property;
e) restitution of property wrongfully acquired;
f) deprivation of some or all civil rights.

At its discretion the court might impose one or more of these penalties (section 3, Article II).

The holding of an official position neither exempted nor extenuated criminal responsibility. Acting on orders might,

[4] Cf. Article 6 of the Charter of the International Military Tribunal.

however, if the court saw fit, be treated as a mitigating circumstance (section 4, Article II).

All persons guilty of acts defined in the Law were liable to prosecution, without regard to nationality or the capacity in which they acted (section 2, Article II).

The Law suspended the term of limitations for the period between 30 January 1933, when Hitler came to power, and 1 July 1945, when the administration of justice was resumed in occupied Germany (section 5, Article II).

Article III contained rules of procedure. They included provisions for transferring to the occupation authorities the right to arrest suspects and take under control the property owned or controlled by them, and the right to prosecute such persons.

Appointment of courts to try the crimes listed in the Law and establishment of rules of procedure for such courts was left to the Zone Commanders. A Zone Commander might defer the execution of death sentences for a period not exceeding one month, and then only if he had reason to believe that the testimony of a person under sentence would be of value in another case.

There was a very important clause to the effect that a German court might try crimes listed in Law No. 10 only if the defendant was a German national or citizen and his victim either the same or a stateless person, and provided, moreover, that the court was authorized to do so by the occupying authorities. The powers of the German judiciary were thus basically limited.

Article IV contained extradition rules. Decisions in these cases were vested in the Zone Commanders, though it should be emphasized that extradition was not the prerogative but

the obligation of the occupying authorities. No doubt had been left on this point by the phrasing of the Moscow Declaration and the London Agreement, which — as we have seen — were incorporated in Law No. 10. The relevant paragraph of the Moscow Declaration read:

> ...those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in... atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done...

In the London Agreement, the purpose of extradition was explicity stated:

> ...in order that they may be judged and punished according to the laws of these liberated countries...

Law No. 10 was preceded by three earlier enactments of the Control Council which were designed to guarantee democratic administration of justice in Germany. These were: Law No. 1 [5] which repealed a number of discriminatory and political laws passed by Hitler; Proclamation No. 3 concerning "Fundamental Principles of Judicial Reform" issued on 20 October 1945; [6] and Law No. 4 of 30 October 1945 on the "Reorganization of the German Judicial System". [7]

Proclamation No. 3 guaranteed equality before the law regardless of race, nationality or religion. No one might be deprived of life, liberty or property without due process of law. Only acts recognized as offences by law might be prosecuted. Punishment on the basis of analogy or "sound popular instinct", as previously allowed by the Nazi criminal code, was prohibited. Defendants were assured the right of

[5] *Official Gazette of the Control Council for Germany*, 29 October 1945.
[6] Ibid.
[7] *Official Gazette of the Control Council for Germany*, 30 November 1945.

speedy and public trial, notification of the nature and cause of the accusation, the right to be confronted with witnesses for the prosecution, representation by counsel and calling of their own witnesses. Excessive or inhuman punishments, or any not provided by law, were not to be inflicted. Sentences on persons convicted under the Nazi régime on political, racial or religious grounds were to be quashed. The "People's Court", the NSDAP Courts and the "Special Courts" were abolished and their re-establishment forbidden. Judges were guaranteed independence from executive control in the exercise of their functions and were to owe obedience only to the law. Access to judicial functions was to be open to all who accepted democratic principles without account of their race, social origin or religion. The only criterion for nominations to the bench was to be merit and legal qualifications.

Article IV of Law No. 4 stated:

> To effect the reorganization of the judicial system, all former members of the Nazi Party who have been more than nominal participants in its activities and all other persons who directly followed the punitive practices of the Hitler régime must be dismissed from appointments as judges and prosecutors and will not be admitted to these appointments.

C H A P T E R II

BEFORE ALLIED COURTS

Thus, in 1945 the necessary legal provision already existed for a rapid and fair reckoning with Nazi criminals throughout Germany and their removal from the country's justiciary. In the Western zones of occupation, however, prosecution was fitful. Indeed, many major criminals were either not brought to trial at all or else proceedings against them were inexplicably discontinued, while those actually convicted were discharged from prison before their sentences had, even allowing for remissions, expired.

By way of illustration, it will suffice to remark that the Western allies in the four and a half years in which they exercised judicial power convicted a bare 5,025 persons, [1]

[1] According to an official report by the Federal Ministry of Justice, Bonn, 1961.

although it was in their zones that Nazi criminals largely collected. Of these only 174 were still in prison at the end of 1954. The twelve death sentences passed by the American Military Tribunal in Nuremberg were all commuted to life imprisonment. [2] By 1952 two of them had already been released. Of the 25 criminals given life terms at these trials, three were discharged, 19 had their sentences reduced, and only in three cases were the judgments upheld. The Tribunal sentenced 22 defendants to 20 and 25 years; in 1953, seven were released and the remainder granted remissions. Of those who received 15-year terms, only two were still in prison four years after their conviction.

Matters took a similar turn where extradition was concerned. [3] As early as 1947, the occupying authorities of the Western zones began putting obstacles in the way of handing over Nazi criminals. Their obstructionism grew from month to month, so that by early 1949 extradition had virtually ceased. Repeated protests by the countries concerned — including Poland, Czechoslovakia and Hungary — were of no avail.

Nor was effect given to the assurance that persons with a Nazi record would be removed from the justiciary. [4]

In West Germany, prosecution of Nazi criminals remained the responsibility, under Law No. 10, of the Allied courts until 1 January 1950, when Law No. 13, promulgated by the Allied High Commission on 25 November 1949, transferred these powers to the German judiciary. The overall results of

[2] See Hermann Langbein, *Im Namen des deutschen Volkes: Zwischenbilanz der Prozesse wegen nationalsozialistischer Verbrechen*, Vienna—Cologne—Stuttgart—Zurich, 1963, pp. 22-3.

[3] See Chapter XI.

[4] See pp. 37-8.

the trials held by the Allies are shown in the following Table: [5]

	convictions for Nazi crimes	death sentences
American zone	1,814	450
British zone	1,085	240
French zone	2,107	104
Total	5,006	794

If we add the criminals tried by the Nuremberg Tribunal we arrive at a total of 5,025 convictions and 806 death sentences. [6]

According to World Jewish Congress figures, published in 1961, the total number of extradited criminals amounted to over 4,000. Of course, more were actually tried in the Allied countries, since some of the wanted persons were captured locally and the question of extradition did not arise. It is worth noting that this category of offenders is still liable to prosecution in the Federal Republic, even though they have already been tried elsewhere; this flows from a rule adopted after the war and incorporated in Polish legislation also (Article 11 §1 of the Criminal Code), to the effect that a criminal may be tried for the same offence by the courts of various countries. It is this principle which led to the prosecution in West Germany of SS-men from Sachsenhausen concentration camp, previously convicted by Soviet courts,

[5] Official report of the Federal Ministry of Justice, Bonn, 1961.

[6] The total number of persons tried for Nazi crimes by courts in the Soviet zone of occupation, and later in the German Democratic Republic, between May 1945 and December 1964 was 16,572. Out of this total, 12,807 defendants were convicted — 118 to death and 231 to life imprisonment.

These figures were given by Herr Joseph Streit, prosecutor-general of the German Democratic Republic, at a press conference in Berlin on 25 January 1965.

and of Oswald Kaduk, who had also been tried in the Soviet Union, in the Frankfurt trial of Auschwitz guards.

In the case of criminals tried by Allied courts the position is reversed. Under an agreement concluded by the United States, Great Britain and France with the Federal Republic on 26 May 1952, the West German justiciary is bound by the sentences passed in the Western occupation zones. This makes the mildness and indulgence shown by the Western Powers towards Nazi criminals all the more serious a lapse, since it is beyond redress.

C H A P T E R III

BEFORE WEST GERMAN COURTS

In West Germany, German organs of justice have been functioning since 1945. Their jurisdiction embraced Nazi crimes committed by German nationals and German citizens against German nationals, German citizens and stateless persons. In 1950, their powers were extended to cover crimes committed against citizens of the United Nations. Nazi crimes were prosecuted first under Law No. 10 and later under the German penal code. An act passed on 30 May 1956 (*Bundesgesetzblatt*, No. 24, 31 May 1956, Vol. I, p. 437). Since then West German courts have quite irrelevantly been arraigning war criminals according to the rules of the German criminal code promulgated in 1871 (with the subsequent revisions).

There is a curious discrepancy between the various official West German accounts concerning the results of these prosecutions.

In November 1964, the Federal Ministry of Justice said that 12,882 indictments, out of over 30,000 investigations, had been filed in the courts as of 1 January 1964. Of this total, 5,445 defendants were convicted — 12 to death, 76 to life imprisonment, 5,243 to shorter terms, and 114 to money

fines.[1] In the remaining cases, proceedings were interrupted by death, operation of the statute of limitations, or lack of evidence.

The figures presented to the Bundestag by Dr Ewald Bucher, Federal Minister of Justice, in March 1965[2] were different. The total number of convictions was now given as 6,115, but the period for which it was calculated was not specified; 4,419 persons, or 72.3 per cent. of that total, were said to have been convicted even before the end of 1949, and a further 1,426 before the end of 1954. Thus, 5,847 persons — or 95.6 per cent. of all those found guilty of war crimes by West German courts — were reported to have been convicted before the end of 1954. This, of course, would be more than the total of 5,445 convictions given for the period ending on 1 January 1964 by Dr Bucher's own Ministry a bare few months earlier.

As for the classification of the various crimes, for the period between 8 May 1945 and 31 December 1962, the convictions broke down as follows:[3]

murder	155 persons
manslaughter	248 persons
other crimes (illegal arrest, assault, etc.)	5,023 persons

Of the 12 death sentences passed, 3 were carried out. The remainder were commuted to life imprisonment as a result of the passing of the Federal Republic's Constitution on 8 May 1949 which abolished the death penalty (Art. 102). Prosecution of all war crimes, with the exception of murder (§ 211 of *Strafgesetzbuch*, the criminal code), has now lapsed under the statute of limitations applied in the Federal Republic (for example, manslaughter — § 212 — in 1960).

[1] *Bulletin des Presse- und Informationsamtes der Bundesregierung*, 17 November 1964.

[2] *Bulletin des Presse- und Informationsamtes...*, 9 March 1965.

[3] Official data as quoted in *Der Spiegel*, 15 April 1964.

C H A P T E R IV

THE WEST GERMAN RECORD IN THE PROSECUTION OF WAR CRIMES

After the Federal Republic had attained full sovereignty, the prosecution of Nazi crimes fell virtually into abeyance. From the figures issued by the Federal Ministry of Justice,[1] it appears that over 90 per cent. of the cases heard by the West German courts were tried before 1954 (that is, while the occupation status was still in force). In 1961-2, barely 100 persons, and in 1963 no more than 87, were convicted.

On 28 April 1958 the trial began in Ulm of ten high-ranking police, *Gestapo* and SD officers. It lasted until 29 August of the same year. The defendants were charged with having committed mass murders of Jews and Communists in Lithuania in the summer and autumn of 1941, and received prison terms ranging from 3 to 15 years. The case proved to be a watershed in the story of West German prosecutions of Nazi crimes.

Even before the trial opened, while inquiries were still being made in the U.S. Information Centre in Nuremberg

[1] *Bulletin des Presse- und Informationsamtes der Bundesregierung*, 17 November 1964.

about one of the designated defendants, Bernhard Fischer-Schweder, it was divulged that the former occupying authorities had a mass of evidence in their archives incriminating a great many Nazi criminals. These records had neither been acted on by the Allies nor made available to the West German authorities. The West German public was treated to further revelations in the course of the trial itself. The proceedings demonstrated beyond doubt that the actions of the defendants were no aberration but part of a general policy of extermination pursued flagrantly and wholesale in the Nazi-occupied countries. The atrocities embarked on by the Nazi system were disclosed in all their horror. In the countries occupied by Germany, none of this had been a secret, but in the Federal Republic prior to the Ulm trial reports from abroad about Nazi crimes had been treated with disbelief and even resentment. Nor had the sentences passed by the Allies made their proper impact, since they were regarded as reprisals by the victors against the vanquished. Ulm was the first major indictment by German prosecution authorities in a German court on German soil. Thus, there could be no challenge to the authenticity of the facts revealed. The trial received enormous publicity, and demands for more vigorous action against Nazi criminals multiplied. The uproar among a section of West German opinion and the echoes abroad forced the authorities to issue official statements and take specific steps to deal with the matter. As Dr Wolfgang Hausmann, Minister of Justice of Baden-Württemberg, commented:

> The trial in Ulm has forced on us recognition of the fact that numerous German criminals have not yet been punished.

To remedy this state of affairs, a central agency was set up for the investigation of Nazi crimes — the Ludwigsburg Office.

C H A P T E R V

LUDWIGSBURG

The Central Office of the *Land* Departments of Justice for the Investigation of Nazi Crimes (*Zentrale Stelle der Länderjustizverwaltungen zur Aufklärung nationalsozialistischer Gewaltverbrechen),* based on Ludwigsburg (Baden-Württemberg), was established on 1 December 1958, following an agreement between the Ministries of Justice of the various *Länder,* and was charged with the collection and preliminary examination of evidence against war criminals. In the interests of thoroughness, the Office has classified its investigations under a number of heads: "Auschwitz", "euthanasia" and so on. On finding grounds for criminal proceedings among the records so accumulated, it refers the case to the appropriate *Land* prosecutors who then take out proceedings against the suspects concerned. For their part, the *Land* prosecutors are supposed to inform (though they do not always do so) the Ludwigsburg Office of any investigations in progress or completed, and even in specific instances to make their files available for inspection.

The powers of the Central Office are, however, limited. It can investigate crimes committed against civilians during the war outside the territory of the Federal Republic, and in December 1964 was authorized also to deal with Nazi crimes perpetrated on the Federal Republic's territory; the territorial range of its competences has thus been extended. But this does not cover offences committed in the course of front-line operations. Thus, crimes against war prisoners, and those of the *Wehrmacht, Waffen-SS* and police battalions committed in battle, have been put beyond reach of the Office.[1] The result has been the complete immunity of certain groups of criminals, above all members of the Nazi armed forces. This presumably can be attributed to a desire to protect at all costs, in the interests of the *Bundeswehr,* the German army tradition.

The Office may question witnesses and suspects, but it has no powers of detention. Its personal dossiers now contain some 120,000 names. The staff consists of prosecutors and judges seconded from the *Land* Departments of Justice, assisted by special police commissions, known as "S Commissions" (*Sonderkommissionen*), numbering 30-40 officers in each *Land.* It is easy to appreciate that the work of the Ludwigsburg investigators is extremely arduous and laborious and that it requires expert qualifications. Documents and publications in various languages have to be studied, archives sifted, films and photographs made. Meanwhile, the small staff, instead of being reinforced to cope with the need to accelerate its inquiries, was actually reduced in 1963. As a

[1] Some Wehrmacht crimes have been examined by Dr Szymon Datner in two studies published in English: "Crimes of the *Wehrmacht* in Poland during the September 1939 Campaign and the period of Military Administration (September 1—October 25, 1939)" in *Genocide 1939—1945,* Zachodnia Agencja Prasowa, Warsaw—Poznań, 1962; and *Crimes against POWs: Responsibility of the Wehrmacht,* Zachodnia Agencja Prasowa, Warsaw, 1964.

result, it takes Ludwigsburg an average of two and a half years to complete each case.[2] In hard figures, the Office succeeded, until the middle of 1964, in getting a bare 153 defendants put on trial of whom 120 were convicted (over half of them to terms of less than five years). Against this, Fritz Bauer, the Prosecutor-General of Hesse, leading in the trial in Frankfurt of members of the Auschwitz staff, has declared that Ludwigsburg has the names of 5,000 SS-men from Auschwitz alone who have yet to be prosecuted.

It can be seen that the work being done by Ludwigsburg is blunted by the fact that only a part of the area in which the Nazis operated and only a part of the persons involved fall within its terms of reference. In addition, short-handedness militates against its speed and efficiency of action. But these are not the only restrictions. Investigations are also obstructed by the moral pressure exerted by certain sections of West German society which have challenged the need for the existence of the Office in the first place, and even resorted to smearing its staff.

One target for particularly vicious attacks has been the Office's prosecutor Barbara Just-Dahlmann, who drew a storm of abuse around her head following a paper read to a meeting of the Evangelical Academy in Loccum in 1961. In it, she took issue with the attempts to bury the past, recalling some of the worst atrocities of the Nazis and denouncing the toleration shown by the West German community to the offenders. The police force, she maintained, was still riddled with war criminals, evidence against whom was in the possession of the Ludwigsburg Office though its hands were

[2] See Kazimierz Kąkol, "22 kwietnia" ["22 April"] in *Prawo i Zycie*, Warsaw, 10 May 1964; report by a member of the Central Commission for the Investigation of Nazi Crimes in Poland on a visit to the Ludwigsburg Office.

largely tied. A year later, she delivered a lecture at the University of Hamburg on "Should the past be left in peace?" in which she took a similar line.

Typically, Barbara Just-Dahlmann's stand also aroused protests in official quarters. Dr Wolfgang Hausmann, the Baden-Württemberg Minister of Justice, who is departmentally responsible for the Ludwigsburg Office, criticized her remarks as sweeping, specious and unsubstantiated.

C H A P T E R VI

THE APPARENT AND THE REAL REASONS FOR THE FAILURES OF JURISDICTION IN WEST GERMANY

The dragging of feet in the German Federal Republic over the prosecution of Nazi crimes is so obvious and blatant, as shown primarily by the trial statistics, that not even official quarters have been able to shrug it off. As already made clear, in West Germany, which has proved to be the main asylum of ex-Nazis, German courts convicted a total of 5,445 war criminals in the course of 18 years, finding barely 400 guilty of murder or manslaughter. This is a figure out of all proportion to the size of the criminal apparatus of the Third Reich and the enormity of the losses and destruction wrought by the Nazis, even if we add the convictions of Allied tribunals (5,025). For example, the SS staff of Auschwitz concentration camp alone numbered 6,000, yet it was not till the end of 1963, over 18 years after the end of the war, that the first major German trial of 22 SS-men from this camp began before a jury in Frankfurt.[1] In Poland alone the Nazis were responsible for the deaths of

[1] Some of the Auschwitz staff had been convicted by the Polish Supreme National Tribunal in 1947.

5,348,000 people, 3,577,000 being killed in death camps, in "pacification" operations, during the liquidation of ghettoes and in executions, and over 1,200,000 perishing as the result of inhuman conditions in the prisons and camps.[2]

In a letter to the *Frankfurter Allgemeine Zeitung,* published in that newspaper on 19 January 1965, Dr Robert M. W. Kempner, former American deputy prosecutor in the Nuremberg war crimes trials, while praising the work done by the Ludwigsburg Office in investigating the crimes of the *Einsatzgruppen* and those committed in concentration camps, pointed out that

> Other complexes of the iceberg of Nazi crime lie even today dark under the surface. Thousands of Nazi murderers are undiscovered...

And he listed entire groups of Nazis whose criminal activities had never been investigated:

> Where [he asked] are the proceedings in the case of the murder of about 186 former members of the German *Reichstag* and the *Landtage*? Where are the proceedings against Martin Bormann's former Nazi *Gauleiters* of whom some 15 have so far gone unpunished and scot free? [...] Have the murderers of [...] the Austrian Federal Chancellor Engelbert Dolfuss been punished? The answer is: no. [...] To this day, with few exceptions (the public prosecutor's office in Flensburg) no one has bothered about the assistant judges and civilian assessors of the so-called [Nazi] People's High Court of the mass murderer Roland Freisler. Neither have the informers and *Gestapo* officials [...] been apprehended to this day.

Dr Kempner noted that some 4,000 priests and nuns had been murdered by the Nazis, 548 having been shot in Poland alone.

[2] See L. Kubicki, *Zbrodnie wojenne w świetle prawa polskiego* [War Crimes in the Light of Polish Law], Warsaw, 1963, p. 28.

> Fewer than four criminal proceedings [he said] have been instituted against the murderers of priests.

He also recalled that, on the termination of the Nuremberg trials, the Allies had turned over to the West German authorities the dossiers of members of the former Reich Chancellery, of Bormann's Party Chancellery and of Alfred Rosenberg's *Ostministerium,* enclosing with them in some cases ready-made indictments. With a few exceptions, the West German authorities had failed to act upon them. Proceedings against Bormann's state secretary and Rosenberg's councillor for Jewish affairs had been dropped.

> More such examples could be cited,

Dr Kempner concluded.

They could indeed. Entire segments of the Third Reich's vast apparatus of terror and oppression have never been investigated — among them Hitler's own Chancellery, the Ministries of the Interior, Justice, Eastern Affairs and Transport, and the administrative and economic offices of the SS. And the list could be extended to include such institutions — all once operating in Poland — as the *Generalgouvernement* Government and the district governors' offices under it, the offices of the Hitler governors in Poznań, Gdańsk and Katowice, the office of the Reich Commissioner for the Strengthening of Germandom, and the SS Race and Settlement Office.

How is it that so many crimes have gone unpunished? Many explanations have been adduced in the Federal Republic, ranging from those of the extreme revisionists, usually to be found in the *National Zeitung und Soldaten-Zeitung*, to the arguments of people like Dr Erwin Schüle, director of the Ludwigsburg Office.[3] The views of such

representatives of the extreme right as Dr Frey, publisher of the *National Zeitung,* Professor Rubin, one of the newspaper's regular contributors, or Professor App, President of the Federation of American Citizens of German Descent, are of course unworthy of notice. They maintain that the crimes committed by Germans during the war were no worse than those of the other belligerents; why then pick on the Nazis? Such trials do Germany political, financial and moral damage; they should be done with, once and for all.

On the other hand, the opinions expressed in the official bulletin of the Federal Government deserve to be taken more seriously. On 20 December 1963 it published an editorial entitled "Why are Trials of War Criminals Still Being Held?", which argued that prosecution of Nazi offenders had been impeded by objective factors, including the following:

1. Most of the documents needed for investigations of suspects were in other countries and had not been made available to the German authorities;
2. Many witnesses and suspects were still prisoners-of-war, above all in the Soviet Union. Other criminals were living in various countries and proceedings against them could not be started;
3. Some suspects had succeeded in hiding under assumed names (e.g., Richard Baer, the last commandant of Auschwitz camp who subsequently died in prison before standing trial; former *SS-Obergruppenführer* Koppe; and two

[3] Incidentally, Dr Schüle himself is a former Nazi: he became member of the NSDAP in 1937, having belonged to the SA since 1933. He admitted it, at a press conference in Stuttgart on 16 February 1965, only after those facts had been disclosed by the German Democratic Republic authorities. Presumably, a former Nazi Party member was considered to be the right kind of person to head West Germany's agency charged with investigating Nazi crimes.

men implicated in the euthanasia programme, former *SA-Führer* Blankenburg and Dr Werner Heyde);

4. Some (e.g., Adolf Eichmann; his collaborator Alois Brunner; two concentration camp doctors who had taken part in sterilization experiments, Josef Mengele and Horst Schumann; and former *SS-Standartenführer* Rauf) had escaped abroad and the Federal Government had been unable to obtain their extradition. Other offenders had died.

Slightly different reasons were given by Dr Schüle in an interview printed in the same official bulletin on 25 May 1964. He considered there were three causes of the delays in German justice:

a) The Allies' exclusion from the jurisdiction of German courts of acts committed against Allied citizens;

b) The Allies' discontinuance of prosecutions of Nazi criminals in 1948 without informing the German authorities of the evidence still in their possession or of the fact that not all the offenders had been brought to trial; and

c) The dispersion of the records of Nazi crimes all over the world, with those in the archives af the Eastern bloc being, except in isolated cases, inaccessible to the Federal Republic.

None of these arguments really holds water

As regards the points made in the first of the articles quoted it is worth remarking that:

ad 1. The Federal Republic was free to scrutinize all the documents relating to war crimes at least from 1 January 1950 when German courts assumed jurisdiction in these cases at the Allies' wish. Whether they exercised this right is another matter.

ad 2. The German POWs were returned by the Soviet Union in 1955 and 1956. It is precisely from this time until the end of 1958 that the virtual suspension of proceedings against war criminals ensued. In other words, the inertia of the West German organs of justice has no connection whatsoever with the detention of German war prisoners.

ad 3 and 4.

It is perfectly normal for criminals of any kind to hide and escape. No law enforcement agencies have ever thrown up the sponge on this account, nor has it made any substantial difference to the results of their work.

Dr Schüle's claims ring equally hollow:

ad a) That the Allies had stopped prosecuting war criminals in 1948 was known at the time. Thus, as soon as the Federal Republic came into being in 1949, it could have taken steps to rectify this state of affairs, while from 1 January 1950, when it assumed jurisdiction over Nazi crimes, it was at complete liberty to set up any machinery necessary for detection. This was only done, and then tentatively, on 1 December 1958 with the formation of the Ludwigsburg Office which, as already indicated, has limited powers.

ad b) The failure to bring to justice many Nazi criminals sheltering in West German territory is notorious. For 19 years their names, addresses and employment, together with their offences, have been publicized in numerous publications. It is beyond belief that the West German authorities of all people should be unaware of the records of these persons and their evasion of punishment. It seems equally incredible

that they should not have learned, years ago, of the existence in various archives of documents incriminating a number of their countrymen.

ad c) To take only the example of Poland,[4] for no less than ten years after the establishment of the Federal Republic the West German authorities showed no interest whatsoever in any documents concerning Nazi crimes that might be in the possession of Polish institutions. It was not until late 1959 that Dr Schüle's own Ludwigsburg Office first approached the Central Commission for the Investigation of Nazi Crimes in Poland on the matter. The Commission at once expressed its readiness to make available to delegates of the Office who would come to Warsaw for the purpose all the documents it had relating to Nazi crimes. The proposal was refused, and so was the suggestion that the Office should accept copies of the documents it needed. The arrangement eventually arrived at consisted in meetings, at the Polish Military Mission in West Berlin, between representatives of the Polish Commission and the Ludwigsburg Office; in the course of three such meetings, held in 1960 and 1961, the West German representatives made microfilms of several thousand pages of documents which they themselves selected.

Then again, for more than three years, the Ludwigsburg Office seemed to have lost all interest. When Dr Schüle himself finally came to Warsaw in December 1964, he refused to see any of the documents at

[4] The following information is based on two interviews given by Dr Janusz Gumkowski, director of the Central Commission for the Investigation of Nazi Crimes in Poland, to correspondents of the Polish Press Agency and of the *Norddeutscher Rundfunk*, respectively, and published in Warsaw newspapers on 23 January and 4 February 1965.

the Commission; he only discussed with the Polish investigators the question of sending to Warsaw a team of Ludwigsburg workers for a ten days' inspection of the documents (the team duly visited Warsaw in February 1965). Talking to a Polish Press Agency correspondent in January 1965, Dr Janusz Gumkowski, director of the Central Commission for the Investigation of Nazi Crimes, pointed out that the documents made available to the Ludwigsburg Office were but a fraction of the many thousands in the possession of both his Commission and other Polish institutions, such as provincial and district archives, museums and research institutes. The West German authorities had shown no interest in those documents, Dr Gumkowski said, and he expressed the view that it would be utterly impossible for the Ludwigsburg team, expected in Warsaw the following month, to examine thoroughly this vast mass of evidence within the short time left before the proposed expiry in the Federal Republic on 8 May 1965 of the time limit for the prosecution of Nazi crimes.

Dr Gumkowski also recalled that the Commission had sent thousands of microfilmed pages of documents to the Ausehwitz trial in Frankfurt, and also that the Polish Prosecutor-General's Office had supplied the West German authorities with voluminous evidence concerning Nazi crimes in Poland. The latter related to, among other things, the criminal war-time activities at Chojnice in Pomerania of Hans Krüger, against whom, however, judicial proceedings had never been instituted, even though the revelations about his past did cost him his membership in the Federal Government.

The half-heartedness of the West German justiciary, however, is not only to be seen in the paucity of the criminals brought to trial. It is equally apparent in the indulgence shown to many suspects and defendants, in the dropping of proceedings despite obvious *prima facie* evidence of guilt, in the excessively sympathetic treatment of prisoners in court, in the failure to prevent the proliferating escapes, in the downgrading of charges to lessen the gravity of the offences actually committed, in the passing of sentences wholly incommensurate with the proven facts, and in the devising of special legal constructions aimed at extenuating the responsibility of Hitler's minions. A few examples will bear this out.

Dr Erwin Schüle[5] has cited the case of an officer of the *Schutzpolizei*, suspected of executing Jews, against whom proceedings were dropped because the prosecutor was convinced that the *Schutzpolizei* had never taken part in actions of this kind. Such disingenuousness makes this same official's report that certain inexperienced judges and prosecutors treated accusations of Nazi crimes as figments of an extravagant and morbid imagination, and so made light of and dismissed the cases submitted to them, seem downright farcical.

Very few of the Nazi criminals apprehended are taken into custody and those that are tend to be released in their own recognizance. In the Auschwitz trial in Frankfurt, for example, many of the defendants were originally out on bail.

When it comes to actual verdicts, the sentences are often ridiculously low. A court in Bonn in November 1962 sentenced former *SS-Obersturmführer* Wilhelm Döring to six years imprisonment for being an accessory to the murder of 683 people. In January 1963, former *SS-Sturmbannführer* Martin Fellenz, on trial in Flensburg, received a prison term of 4 years for aid in the mass murder of 39 thousand Jews in Poland. In a trial in Nuremberg-Fürth in May 1963, Joseph Paur, a war-time official in the Nazi administration of occupied eastern territories, was given a term of seven years for aid in the murder of 2,414 people. In the same trial, Wilhelm Wacker was sentenced to three years imprisonment for aid in the murder of 1,006 people.

[5] "Die Zentrale der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Gewaltverbrechen in Ludwigsburg" in *Die Verfolgung nationalsozialistischer Straftaten in der Bundesrepublik*, a publication of the Press and Information Office of the Federal Government, Bonn, 1962, reprinted from *Juristenzeitung*, Vol. 17, No. 8, 1962.

The most notorious of recent examples of such ludicrous verdicts has been that in the case of the former *SS-Sturmbannführer* Hermann Krumey, Adolf Eichmann's deputy in Hungary in the closing stages of the war. A court in Frankfurt on 3 February 1965 sentenced him to five years' hard labour for aiding and abetting in the murder of 300,000 Hungarian Jews. Actually, Krumey was spared even a day of hard labour: a few days after the verdict he was released, having already served five years in pre-trial detention. In the same trial, Krumey's war-time colleague Otto Hunsche was acquitted; passing judgment, Dr Arnold Schmidt, the chairman of the court, said he had given Hunsche "the benefit of the doubt".

It has, in fact, been calculated by the Ludwigsburg staff that the average sentence for a Nazi murderer works out at about 10 minutes per victim.[6]

The euthanasia trial in Limburg is a story of another kind. Originally there were four defendants headed by Dr Werner Heyde. The indictment accused them of the murder of 100,000 incurables. Up to 1959, Dr Heyde had lived and

[6] Quoted after Barbara Just-Dahlmann, *Der Spiegel*, 13 December 1961.

practised in Schleswig-Holstein under the alias of Sawade. His real identity was known to a number of leading public figures, and when he was accidentally exposed, many of these influential personages conspired to prevent, or at least defer, prosecution. When these efforts failed, a series of mysterious accidents ensued. One of the defendants, Tillman, while on bail, leaped out of a window in Cologne, or so runs the official report of his death. Heyde was found hanged in his cell. Earlier, another of the accused, Bohne, had fled to Argentina where he was arrested but whence he has yet to be extradited. Finally, in February 1964, the body of Edo Osterloh, the Schleswig-Holstein Minister of Religious Cults, who had inside knowledge of the euthanasia scheme and its protagonists, was discovered floating in the Bay of Kiel. That same month, one of the crucial documents in the prosecution's case, Heyde's speech to a Reich Tribunal on the euthanasia programme, disappeared mysteriously.[7] In the end, the only prisoner left in the dock was Hans Hefelmann, a former official in Hitler's Chancellery.

The question of indictments being quashed because of incorrect wording, or being brought under the wrong section of the penal code, and the meretricious theoretical constructions resorted to as a means of minimizing the culpability of Nazi criminals will be discussed at greater length in subsequent chapters. For the moment, let us consider what are the reasons for all these slip-ups in the operation of the West German law enforcement agencies in the matter of dealing with Nazi crimes?

The answer is depressingly simple. It is the attitude of a large majority of West German society, and especially of government circles and official quarters, and the justice administration itself.

[7] See Kazimierz Kąkol, *op. cit.*

The Bonn authorities usually take action on Nazi crimes only when provoked by a public scandal and, despite their protestations, they seem to have little real intention of dealing with the problem by punishment of the guilty. The Ludwigsburg Office, whose investigations are indispensable to the detection of Nazi criminals, was set up only 13 years after the war — following the uproar over the Ulm trial; the Federal Ministers Oberländer and Krüger were not relieved of office until an embarrassing hue and cry had been raised abroad. It took a similar campaign of disclosures to get rid of Dr Adenauer's chief aide, Hans Globke, and Wolfgang Fränkel, the former Federal Prosecutor-General.

In the years 1956-62, several lists were published in the German Democratic Republic of West German lawyers who, when serving in the Third Reich's justiciary, had actively contributed to carrying out the objectives of the Nazi system; the lists comprised a total of 1,188 names. The sentences passed by some of the judges of Nazi special and military courts had been part and parcel of the extermination policies pursued in relation to the subjugated nations of Europe, the penalties having been out of all proportion to the offence committed. Petty misdemeanours were not infrequently punished with death. In cases when the letter of the law provided no basis for such drastic punishment, the concept of *Volksempfinden* — "popular instinct" — was invoked. Not surprisingly, the term *Blutrichter* came to be applied to those former Hitler judges. In 1964, the National Front of Democratic Germany published a further list of 122 Nazi lawyers active in the Federal Republic.[8] In spite of these revelations, many of the people included in the lists continue

[8] *Bonn sanktioniert Kriegsverbrechen. Dokumentation über weitere 120 Kriegs- und Sonderrichter Hitlers im Dienste der Erhard-Regierung*, Berlin, November 1964.

to hold important posts in the West German administration of justice; their criminal past does not seem to bother either them or their superiors very much.[9]

The situation in the police does not seem to be any better. In March 1959, the government of Baden-Württemberg told the *Landtag* that 152 of its police officers were former members of the *Gestapo*. The Social Democrats have charged that the entire police force is riddled with ex-Nazis, who take good care of former SS-men.[10] Whether the situation has much improved since, is highly doubtful. This being so, it is not surprising that Nazi criminals have frequently had to be escorted to jail not by policemen but by lawyers, since no officer was prepared to undertake this duty.

So much for the attitude of the authorities and the judiciary. What of the "man in the street"? Arthur Miller, the

[9] A most recent instance of the protection accorded by the West German authorities to compromised Nazi lawyers was the case of Dr Leo Drach. Now chief public prosecutor in Frankenthal in Rhineland-Palatinate, Drach served during the war as prosecutor in a series of special court trials in occupied Luxemburg, in which the death penalty was demanded and carried out. For this after 1945 he was sentenced to 35 years' hard labour by a Luxemburg tribunal.

In 1954, Drach was pardoned. Two years later, he became a *Land* prosecutor in West Germany, and was promoted in 1961.

In early January 1965, the Luxemburg Government protested against attempts in Rhineland-Palatinate to defend Drach. Herr Fritz Schneider, the *Land* Minister of Justice, had said in a newspaper article that Drach had in wartime only applied the laws then valid, and he rejected the idea of starting inquiries against the public prosecutor.

It was only after several days that the Chief Minister of Rhineland-Palatinate, Dr Peter Altmeier, offered an apology to the Luxemburg Government and suspended Dr Drach in his functions. The *Landtag* of Rhineland-Palatinate subsequently appointed a commission to investigate the circumstances of Dr Drach's appointment and promotion.

[10] See T. H. Tetens, *The New Germany and the Old Nazis*, New York, 1961, p. 176.

distinguished American playwright, wrote after a visit to the Auschwitz trial in Frankfurt:

> ...lawyers on the tiny prosecution staff believe that 90 per cent of the German people are opposed to this and other trials like it. They base their judgment on the mail they receive and on their own difficulties in getting local co-operation for some of the arrests they have made, and finally, on the absence of any clear voice or movement among the Germans demanding that the country's honour be cleared by bringing such murderers to justice.[11]

[11] "At Auschwitz Trial: Unanswerable Question Hovers Over Courtroom". *New York Herald Tribune*, European edition, 7-8 March 1964.

C H A P T E R VII

THE METHODS OF JUSTICE

Where Nazi criminals are concerned, the West German courts have developed a distinct practice which is at variance with the principles acted upon in the period before the Federal Republic achieved sovereignty. Under the legislation in force in West Germany, Nazi crimes are treated as common offences, and not such as come within the terms of reference of international law; they are not qualified as war crimes or crimes against humanity but are prosecuted under the relevant sections of the criminal code. This raises certain crucial difficulties of a legal nature. Because of their scope, dimensions and form, Nazi crimes cannot be equated with any of the hitherto known and statutorily classified kinds of offences. Mass murder is intrinsically different from homicide as traditionally understood. In Law No. 10 Nazi crimes cover various acts, while from the substantive point of view they have been conceived in the form of complicity. Under Article II section 2, an offence is considered to have been

committed not only by the person who actually carried it out but also by those who ordered or abetted it, consented to the act or even were connected with plans or enterprises involving its commission This is an extremely broad interpretation of complicity, since it extends even to preparation which is not usually indictable. As regards the defendant's responsibility, it makes no difference whether he was the perpetrator, an instigator or an accessory; every act which formed part of a criminal operation is treated as an offence within the meaning of the act.

The criminal code, on the other hand, does not provide an effective instrument for prosecuting Nazi crimes. Acts of this kind cannot be accommodated within the framework of ordinary criminal law. Above all, mass murders and operations directed against whole groups of people rather than individuals are a new type of crime unknown to traditional legislation. The problems this poses for the practice of the courts have been examined by Leszek Kubicki who argues that the application of the standard provisions of criminal law to offences of this kind entails falling back upon juridical sophistry of the most arrant order. To be consistent with these, the chain of acts culminating in the extermination of a particular ethnic or national group — which, in fact, constitutes a single operation and, in sociological terms, a wholly novel type of crime, "genocide" — would have to be broken down into its separate links (episodes) embracing only certain phases of this complex action, and the treatment of these episodes in isolation distorts the picture of what actually happened. [1]

Genocide is not ordinary murder. To prosecute it under the same act as murder is misleading, as is shown by the judgment given by a jury court in Bonn in February 1959

[1] Kubicki, op. cit., p. 59.

in the trial of Sorge and Schubert, two SS officers from Sachsenhausen concentration camp. One of the counts against them was complicity in the execution of 10,000 Soviet POWs. This particular action lasted several weeks and both defendants were proved to have taken a personal part in the shootings. In its judgment against Schubert, the bench weighed the problem of whether there was a number of acts involved or only one, and concluded that "the executions should be treated as a single act as the result of which 10,000 persons were killed".[2] In substantiation, it adduced the following reasoning: Schubert was acting on orders. His superiors would undoubtedly have preferred to achieve their purpose (the killing of 10,000 prisoners) by employing a machine which would do the job at a single press of a trigger. This being technically impossible, they contrived a substitute in the shape of the SS staff of the camp. The issuing of the order acted just like a trigger in setting the death machine in motion. Both those who gave the orders and those who carried them out were pursuing an integral purpose resulting from the decision to liquidate the prisoners and hence their action, designed to produce this "single" effect, was essentially a single act.

This "single" act, as it turned out, earned Schubert a life term, the maximum penalty. But it is not the fitting of the punishment to the crime that is the point. The crux of the matter lies in the formula: 10,000 = 1. Though the court stressed that the degradation of a man to the point where he treated his victims not as individual human beings but as a faceless mass was particularly deserving of condemnation, in its judgment it in fact upheld this practice. By finding the defendant guilty of a single offence only, it accepted that only one legal good was violated, and not a whole

[2] *KZ-Verbrechen vor deutschen Gerichten*, Frankfurt a/Main, 1962, p. 344.

number of goods in the shape of thousands of human lives. But, surely, if a person through a series of actions causes a series of deaths, he has committed a number of offences and not just one. In any case, the technique of extermination was such that it is possible to divide it into separate acts of murder. The victims were led, one at a time, into a special cubicle ostensibly for medical inspection. They were placed with their backs to a partition on which a scale was marked. Above the scale there was a slit concealed by a sliding flap. The moment this was pulled down to the level of the prisoner's head, apparently to measure his height, it uncovered the aperture in the partition and an SS-man on the other side shot the victim. The body was then removed, the cubicle washed down with water and the next man brought in.[3] On his own admission, Schubert killed at least 100 prisoners in this way. This adds up to 100 murders; yet the court pronounced it a single act. In this single act, Schubert's 100 victims, indeed the whole 10,000 murdered, are obliterated, and the real picture is falsified and blurred. After all, from the whole proceedings of a trial, it is usually only the sentence of the court which is fastened on by the public. Thus, if Schubert was found guilty of murder in 46 cases (one of them being the execution of the Soviet prisoners), it is only logical to conclude that only 46 persons were killed by him. Who would suspect that there is a special arithmetic of crime in which 1 = 100 or 10,000?

In discussing this case, it is not our intention to accuse the court in Bonn of negligence or of attempting to distort the facts. It was in fact exceptionally scrupulous and thorough in its handling of the trial of the Sachsenhausen executioners, and reached a verdict consistent with the dictates of justice. Our criticisms apply simply to the point

[3] Ibid., p. 331.

that Nazi crimes cannot be treated as ordinary offences, the substance of which is defined in the provisions of criminal law. They constitute a problem which is bound to confound courts, with no precedents to guide them in trying crimes of such a scale and of such dimensions.

Further difficulties arise over the interpretation of the criminal code. At present, Nazi criminals may be convicted on only one count — that is under §211 of the criminal code (murder), since prosecutions for all the other crimes are held in the Federal Republic to be now barred by the statute of limitations. The second section of the paragraph referred to defines a murderer as someone who kills out of bloodlust, to satisfy a sexual urge, for profit or for other low motives, as the result of a trick or cruelty, while acting in a manner likely to cause general danger, or in pursuance or concealment of another crime. Some of the acts committed by Nazi criminals fit this definition beyond all doubt — for instance, killing a prisoner by pumping water into him (cruelty). The difficulty arises when a court has to adjudicate on a submission of "low" motives. By contrast with the concept of cruelty, which is unambiguous and universally understood as the infliction of extreme suffering, a definition of "low" motives depends entirely on subjective judgment. Some guidance is provided by judicial rulings, especially those of the Supreme Court. In the interpretation of the *Bundesgerichtshof* (*Bundesgerichtshof in Strafsachen* [*BGHSt*] 3, 132), [4] a low motive is to be understood as one which, according to common moral assessment, lies at the lowest level, is marked by uncontrolled, consuming egoism, and hence is particularly reprehensible. This is too vague a definition to be of much help. On a strict reading, it would mean conceding that homicide committed in the prosecution of one of Hitler's

[4] See Kohlrausch-Lange, *Strafgesetzbuch*, Berlin, 1956, p. 424.

criminal programmes (euthanasia, for instance) and, therefore, in the interests of the German state, without any personal motives involved, could not be qualified as murder if none of the other statutory premisses set out in §211 were involved. This, of course, is quite unacceptable. As a result, the *Bundesgerichtshof*, in a number of other rulings, has had to extend the concept of "low" motives to include, among other things, political and racial intolerance.

The horrors of the Second World War made it necessary to class certain crimes in a wholly new category: genocide — that is, the liquidation of national, ethnic or religious groups. The 1948 international Convention for Outlawing Genocide gave a legal definition of these crimes. With the accession of the Federal Republic to the Convention, a new section, §220a, dealing with the responsibility of perpetrators of this crime, was added to the criminal code. It came into effect on 22 February 1955. This revision of the law is another sign of its previous inadequacy for the prosecution of crimes of this type. But although the mass murders committed by Nazi criminals come within §220a, the principle of *lex retro non agit* prevents it being used against them, since an offender can be charged only under laws which were in force at the time. Thus, they are tried according to the provisions of the criminal code which were binding when they committed their crimes.

It should be remembered, however, that during the Allied occupation German courts prosecuted Nazi criminals under Law No. 10, so that no problems arose as to the legal designation of their acts. This Law was specially designed to fill the gap in the criminal code which did not single out Nazi crimes as a separate kind of offence, since they were a previously non-existent criminological phenomenon. After the Federal Republic had achieved sovereignty, Law No. 10 was

not retained in force, although it would have been reasonable that this proven instrument of punishing Nazi criminals should have been included in the German statute book. After all, Article 25 of the West German Constitution, adopted on 8 May 1949, states:

> The rules of International Law shall form part of Federal Law and take precedence over it and create rights and duties directly for the inhabitants of Federal territory.

Although Law No. 10 was promulgated by the occupying powers, it need not have been treated solely as the act of a foreign authority, since it was based on the rules of international law embraced by the Federal Republic.

In addition, the jettisoning of Law No. 10 came into collision with an agreement concluded by the three Western Powers with the Federal Republic. Under the terms of the Convention on the Settlement of Matters Arising out of the War and the Occupation, which formed part of the contractual agreements signed in Bonn on 26 May 1952 and was subsequently incorporated in the Paris Treaties of 1954, the Federal Republic was given the right to amend, repeal or deprive of effect earlier Allied legislation. However, the enactments of the Allied Control Council were explicitly excluded, and Law No. 10 was one of those. When the agreement between the Western Allies and the Federal Republic came into effect, the Allied High Commission rescinded only Articles III, IV and V of this Law.[5] Article II, however,

[5] This was done at the request of the Federal Government, Mr McCloy, the American Chairman of the Commission, having let Dr Adenauer know about its decision in the following letter dated 23 May 1952:

"Mr Chancellor,

In the course of negotiation of the Convention on the Settlement of Matters Arising out of the War and the Occupation, the Federal Government has requested the Allied High Commission to deprive of effect in the territory of the Federal Republic certain legislation of the Control Council. I have the honor to inform you that the Council of the Allied High Commission, after consideration of this request, has decided that it will deprive of effect from the date of coming into force of the Convention on Relations between the Three Powers and the Federal Republic of Germany and the Related Conventions, the following legislation of the Control Council: Proclamation No. 2, Law No. 23, Law No. 25 and Articles III, IV and V of Law No. 10.

I beg your Excellency to accept the renewed assurance of my highest consideration

John J. McCloy,
Chairman."

Quoted after *Pariser Verträge*, Karlsruhe, 1955.

which defined the kinds of Nazi crimes and the principles of substantive responsibility, remained in force. The retention of certain legal acts passed by the occupation authorities did not impair West Germany's sovereignty since they were accepted in the course of ratification of the agreement, and ratification in itself is a sovereign act. Thus, there were no legal obstacles to the continued enforcement of the basic rules of Law No. 10.

As a result of the jettisoning of Law No. 10, the very concept of Nazi crimes was disposed of in the Federal Republic. The downgrading of such crimes to the rank of political offences, as defined in the criminal code, made such acts as war crimes, crimes against peace and crimes against humanity no longer punishable. The penal code provides no basis for the prosecution of those involved in the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances", the "deportation to slave labour... of civilian population of or in occupied territory" and "persecutions on political, racial or religious grounds", or of many others who, while not having themselves stained their hands with the blood of people, were "mere" organizers of the system of terror and oppression.

In the German Federal Republic, Nazi crimes are liable to prosecution only if they were in the nature of criminal offences. The mechanism of the Nazi system is thus adequately protected.

C H A P T E R VIII

LEGAL QUALIFICATION TO THE DEFENDANT'S BENEFIT

The layman might be wondering what difference it makes which law is enforced since both murder and genocide carry the same statutory penalty so that the legal designation of the offence makes no difference to the severity of the sentence. However, the matter is not as simple as it might seem. By interpreting the law in a particular way, murder can cease to be murder. Logic would suggest that genocide, which is essentially murder multiplied, should be treated as the heaviest crime. Yet in the Federal Republic defendants found guilty of the deaths of hundreds or even thousands tend to be sentenced to a few years imprisonment, whereas those accused of a single murder receive life terms. The clue lies in the indictment: the mass murderers are almost invariably charged, not as perpetrators, but as accomplices, which makes all the difference in passing sentence.

Before going into the merits of the question, a few words need to be said in explanation of West German criminal law. In addition to direct commission of a crime, the code also recognizes complicity plus two contingent forms of participation: incitement and aid.

In the broadest terms, the perpetrator is the person who actually commits the offence or causes another to act on his behalf.

Complicity, as set out in §47 of the Criminal Code (*Strafgesetzbuch*) consists in conscious participation in the commission of an offence together with others and with the same intent. §47 states:

> Where a number of persons commit an offence together, each shall be prosecuted as the perpetrator.

Incitement means deliberately inducing another person to the commission of an offence (§48).

Aid involves deliberately assisting, through advice or action, a person in the commission of an offence (§49).

The West German courts when trying war crimes resort to a peculiar subjective theory in passing sentence. According to this, the touchstone of whether the defendant is guilty of execution or only of incitement and aid is his attitude to the offence: has he acted at his own bidding (*animo auctoris*) or at another's (*animo socii*)?

As an example of how this theory works in practice, there is the judgment of the Bonn court (March 1963) in the case of Burmeister and 12 others accused of murdering 152,000 Jews in Chełmno concentration camp. Although they had admittedly been instruments of the Nazi machinery of extermination, 6 of the defendants were found guilty of aid since "they had not desired the murders as their own acts";

6 others were acquitted and the case against the thirteenth was dropped on account of his illness.

If the direct agents of murder are regarded as abettors, we might well ask: who was it they helped? Presumably those who organized mass extermination and set the "machinery of death" in motion. So we might suppose, but we should be in error. In July 1961, the case of the execution of 23,000 Jews in Białystok came up before a court in Munich. The chief defendant was Dr Otto Bradfisch, a former *SS-Obersturmbannführer* and high-ranking official, who organized the operation. In his testimony, he recounted a long conversation with Himmler, from which it appeared that the order to kill the Jews had stemmed from Hitler. Bradfisch was sentenced to ten years for being accessory to the murder of 15,000 people. Whom did he help? Himmler? Hitler? There are millions of dead, but not a single culprit. So it comes about that murder has ceased to be murder.

This preposterous casuistry has been trenchantly demolished by Professor Jürgen Baumann of Tübingen University:

> If orders are in every case to lead to their executants being recognized merely as assistants, then only Hitler would be responsible for the murders committed by the *Einsatzgruppen*. All others who took part in the execution of the Führer's orders, even Himmler himself and the other leading figures of the National-Socialist system, would be no more than accomplices: one murderer and 60 million accomplices, or Germany, a nation of accomplices. [1]

Characteristically enough, the West German courts hardly ever apply the complicity clause. According to a Supreme Court ruling,

[1] Quoted after Reinhard Henkys, *Die nationalsozialistischen Gewaltverbrechen*, Stuttgart—Berlin, 1964, p. 229.

> ...to prove complicity, it is necessary and sufficient to show that the participant desired to cause the whole effect of a criminal act as his own, but on the basis of a common decision and common efforts, and so that he desired as the indirect perpetrator to supplement his own action with the actions of another or a number of associates.[2]

This definition of complicity is fulfilled above all by mass murders committed against large groups of population. An operation of this kind required planning and organization, and a division of assignments as between headquarters and the men on the spot. The actions of each link in the chain were complementary, and at each there was full awareness of the consequences of the whole operation. Participation in it signified willingness — or at least consent — to produce this result (the absence of compulsion or necessity will be discussed elsewhere).

In those cases where murder is not an individual act either in terms of its agents or its object, but the integrated action of a number of persons against a whole group of population, there are obvious difficulties in delimiting the responsibility of all those involved. The only way out is to employ the complicity construction, and this is the solution adopted by the Polish Decree on the punishment of Nazi criminals of 31 August 1944. Article 1 contains the phrase: "Whoever... took part in the commission of homicide" which covers wider ground than the "whoever kills a man" of Article 225 §1 of the Polish criminal code. The "taking part" wording is designed to embrace all the possible methods of action. In a judgment of 29 May 1949 the Polish Supreme Court ruled that

> ...the legislator was making allowance for the nature of fascist crimes where mass homicide was not usually the result of a single act of physical violence against a person, but the effect of a whole system of homicide participated in by many elements of that mechanism created by Nazism for the killing of human beings.[3]

[2] Quoted after Kohlrausch-Lange, *op. cit.*, p. 158.

The West German Supreme Court has, it is true, occasionally found complicity in war crimes cases. But its position on this point has not been consistent nor has it been followed by the lower courts. For instance, Theodor Werner Scheu, accused of assigning his SS subordinates to executions of Jews and himself personally shooting many of the victims, was found guilty by a jury in Aurich in May 1961 of aid in the murder of 220 persons and was sentenced to six years imprisonment. This verdict was set aside by the *Bundesgerichtshof* in 1962 in the following judgment:

> Anyone who in such a frame of mind, in such conditions and in such a way, deliberately takes part in an execution as here described is not... an accessory to another's homicide but is rather killing in complicity.[4]

This opinion was not shared by the lower court, however. Re-trying the case of Otto Bastian, another defendant in the Scheu prosecution, it once again found only aid, this time in the murder of 96 victims.[5]

It might be asked why the West German courts prefer the construction of aid to that of complicity, even though the latter is more appropriate to the nature of Nazi crimes. The answer is to be sought in the West German criminal code. Under a charge of complicity, each of the defendants is answerable as the perpetrator and hence is liable to the penalty provided for the offence in which he played a part.

[3] See *Państwo i Prawo*, No. 9-10, 1949, p. 196.
[4] See Henkys, *op. cit.*, p. 231.
[5] Ibid., p. 266.

If the crime is murder, he is tried as a murderer. With aid it is otherwise. Paragraph 49 section 2 states that

> ...an accessory shall be sentenced under the same statute as is applied to the offence in which he deliberately assisted but [the penalty] can be reduced according to the rules for the punishment of attempt.

These rules are to be found in §44: if the penalty for an offence is life imprisonment, it may be commuted in the case of attempt (and thus, in conjunction with §49.2, of aid) to a shorter term, not less than three years; for other offences, it may be reduced to one quarter of the minimum statutory sentence.

The practice of using the aid construction was initiated at the Ulm trial referred to earlier. All ten defendants, Bernhard Fischer-Schweder, a former SS and police chief, and other high-ranking SS, *Gestapo,* SD and police officers, were convicted of being accessories to murder. This was the indictment, even though Fischer-Schweder had volunteered his *Schutzpolizei* unit for extermination duty and had once even taken personal charge of an operation. He was not simply a man behind a desk passing on orders; he actually took part in the murders. The other defendants were also, in the same way, personally involved in the extermination action. The follow-up to the Ulm trial was the prosecution of Wiechert and Schultz, two subordinate officers who carried out the Ulm protagonists' orders. They were convicted at Tübingen in 1961, again of being accessories to mass murders. Once more there were no murderers: only accessories.

It should be added that §44 in its present form was introduced in May 1943. Previously, commutation of sentence had been mandatory. Since the paragraph was amended, the

court may, but need not, reduce the penalty for aid. It can, therefore, impose the maximum sentence even if a defendant is charged with being an accessory to — and not with committing — an offence. This, of course, applies only to crimes committed since the law was changed. But an analysis of verdicts would show that the courts still fell themselves obliged to mitigate sentences in the case of aid. In 1962 in Heilbronn, former *SS-Oberscharführer* Rudolf Theimer was sentenced to four years for being an accesory to the murder of 12 prisoners, and former *SS-Sturmscharführer* Paul Heilig to three and a half years for being an accessory to 24 murders, though these crimes had been committed in 1944. It might be thought that participation in mass murders was adequate grounds for the severest treatment of the culprits; the court, however, felt otherwise and pronounced the minimum sentences.

From what has been said, it can be seen that the way in which the acts of Nazi criminals are qualified may be and is an instrument of their defence. It is not the only one.

C H A P T E R IX

CIRCUMSTANCES EXCUSING UNLAWFUL ACTIONS

In certain circumstances, an act which would otherwise be an offence ceases to be unlawful. No crime can be committed by a person acting under irresistible physical compulsion, under an error of crucial fact, in self-defence, or in a state of unavoidable necessity. Such circumstances are frequently invoked by Nazi criminals.

Self-defence consists in an action taken to ward off an attack on oneself or a third party. Absurd as the very idea of armed SS-men having to defend themselves against unarmed prisoners, frequently women and children, may seem, it has not prevented submissions of this kind being made in court. Dr Aschenauer, defence counsel in Trial No. 9 (*Einsatzgruppen*) before the American Military Tribunal in Nuremberg in 1948, maintained that the defendants, though

they had committed the acts with which they were charged, had done so in self-defence for the benefit of a third party, namely the Third Reich, and went even further to argue that, if they had been mistaken in their judgment that the prerequisities of defence had existed, this should be treated as an error about fact.

Such a plea, if accepted, would logically entail finding the accused innocent, and it was duly brushed aside by the Tribunal, which declared in its judgment:

> Dr Aschenauer's legal position on assumed self-defence has been discussed not because it corresponds with any accepted tenets of international law but only for the purpose of demonstrating that under any law the acts of his client and others falling in this category cannot by the widest stretch of imagination be justified as an act of self-defence in behalf of Germny.[1]

The thorniest tangle of legal problems, however, arises over the question of orders. Basically speaking, the fact of executing an order can only protect the offender from punishment. Technically, he has still committed a crime but the penalty may be waived since the law imposes on him an obligation to obey orders. If the order is illegal, the person answerable is the one who gave it. Total exemption from punishment, however, is permissible only if the law requires absolute or "blind" obedience to orders. Otherwise, the executant may be arraigned alongside the principal. The limits of obedience are laid down in the clause which regulates responsibility for acts committed under orders.

The principle of blind obedience was not admitted by the German army code under the Third Reich. Article 47 stated:

[1] American Military Tribunal, Trial No. 9, stenographic record, Vol. XXVII, p. 6718.

§1. If, as a result of the execution of an order in service matters, criminal law is violated, total responsibility rests with the commander who gave the order.

§2. A subordinate who carries out such an order is, however, liable to punishment as an accomplice if: 1) he exceeded the orders given him, 2) if it was known to him that the orders of his superior involved an act which had at its object the commission of a common or military offence or misdemeanour.

The principle of limited obedience has been emphasized in both theoretical writings and judicial rulings. A well-known commentator in the Nazi period, Professor Schwinge, wrote:

Thus, both in army life and in other fields no principle of absolute or "blind" obedience exists.

This concept has also been rejected by the Federal Supreme Court:

Criminal law recognizes no grounds for justifying blind obedience, and cannot do so, since it would mean repudiating the principle of personal responsibility.[2]

These considerations led the Supreme Court to declare that the oath taken on joining the SS which enjoined blind obedience did not, from the legal point of view, affect responsibility because it was voluntarily accepted by SS members and not imposed by statute. In any case, they were also bound by §47 of the army code, as can be seen from §1 of the regulation of 14 October 1939 setting up special courts for the trial of SS and police officers in criminal matters. The relevance of these rules, even though they were issued under Hitler, has been affirmed by a ruling of the *Bundesgerichtshof* (*BGHSt* 5, 239).

[1] See Langbein, op. cit., p. 55.

In time of war, the army code was extended to all administrative staff, hired employees or other persons who accompanied the fighting army (§55).

Thus, the executant of an order is criminally responsible if he knows that his act is essentially a statutory offence. Since the code does not refer to military crimes only, it extends his accountability to all actions which are prohibited by any statute.

Meanwhile, two lines of argument are pursued by counsel in seeking to exculpate Nazi offenders:

1. The defendant did not know that his orders concerned an unlawful act; and
2. Even if he was aware of this, he was compelled to perform them to avoid the personal danger to which he would be liable in the event of non-compliance (unavoidable necessity).

Ad 1:

To establish the responsibility of the executant of an order, it has to be proved that he knew he was violating the law by his actions and that there were no extenuating circumstances. A member of a firing squad, carrying out a sentence passed by a legitimate court, is not guilty of homicide since his act is sanctioned by law. It should be emphasized that it is only exceptional circumstances defined by statute that can justify an action which is intrinsically criminal. This exemption must be explicitly stated in legislation; it should never be inferred through a liberal interpretation or by analogy. There was no law which ordered murder, assault or plunder. None of the commands issued in connection with the extermination of population and violation of its basic rights had a basis in any existing legislation. They could not, therefore, be legally authorized. It would be unconscionable

to contend that every order emanating from public authority is invested with the nature of law on account of it representing the will of the state. It is even arguable whether there is absolute freedom to pass enactments which run counter to society's deep-seated sense of what is lawful. This problem was raised, in connection with the Auschwitz trial, by Dr Ilse Staff in an article "Hitler ist kein Alibi".[3] She began by quoting a Supreme Court judgment (*BGHSt* 2, 237):

> The freedom of the state to ordain what is and is not lawful may be very wide, but it is not limitless. In the minds of civilized peoples there is, for all the differences there may be in the legal order of particular countries, a certain basic core of law which in the general conviction may not be infringed by any statute or by any ordinance of government. It embraces certain rules of human conduct regarded as inviolable, which have in the course of time grown up among all civilized nations from the soil of common moral beliefs and which are considered legally binding regardless of whether national legal systems contain clauses which permit them to be transgressed.

Dr Staff is critical of this passage, pointing to the dangers of its vague appeals to what is in effect "natural law". This was also invoked by the *Reichsgericht,* the Supreme Court of the Third Reich, which stated in one of its rulings that "natural law" in its objective sense meant the sum total of legal rules which imposed on the whole of mankind duties prescribed by nature itself, and not by positive law. Among these rules was the obligation of loyalty which every citizen owed his country and his compatriots. This ruling was handed down in 1928. A few years later, loyalty to the state assumed the shape of obeying orders to kill.

In deciding whether there was cognizance of the criminality of an act, surely it suffices to go by man's normal capacity to appreciate what he is doing and to control his conduct. Does

[3] *Die Zeit*, 28 February 1964.

he have to be explicitly told that murder is a crime? Can he have any doubts that massive and brutal violation of fundamental human rights is unlawful? In these situations the distinction between right and wrong is a matter of the simplest ethical and legal concepts. It is worth recalling part of the examination of Seibert, one of the defendants in Trial No. 9 before the American Military Tribunal.[4] After asking him whether he would carry out orders to shoot his parents, the judge took him through a further series of questions which led to the following dilemma: if he received an order to kill two innocent parents only because they were Jews, would he refuse to obey it? The answer was that he would. Clearly, even the worst criminals are aware of the limits to which obedience to orders can go.

There is one other problem to be dealt with: could unawareness of the illegality of an act have sprung from a conviction that what would normally be an offence was justified by the necessity of war? The general answer to this question can only be "no". The High Command of the Reich made a point of all ranks being familiar with the laws and customs of warfare. In 1940, an additional preface was added to the German manual of military law. This said:

> In the present war, the exposition of international law has acquired greater importance than in any preceding conflict... In this connection, enemy propaganda is persisting in various elaborate tricks to bring into prominence the issues of law relating to war and responsibility for war, which makes it seem essential to explain and study thoroughly the rules of international law binding on the German war leadership.

Thus, knowledge of international law was intended to serve not its observance, but as protection against the

[4] American Military Tribunal, Trial No. 9, stenographic record. Vol. XXVII, p. 6730.

"elaborate tricks" of enemy propaganda. As a result, each soldier was instructed in the prohibitions contained in international law. The first page of the booklet listed what it called the German serviceman's "ten commandments for the conduct of war". The seventh stated: "The civilian population is inviolable". Taken in conjunction with the enormity of the crimes committed against civilians, this reads like the grimmest cynicism.

Since the Nazi authorities were so concerned with their agents' knowledge of the rules of international law, ignorance of wrong-doing would seem to be an unconvincing plea. Yet this is a defence raised in the Federal Republic, and not without success. A court in Bremen in March 1961 dismissed the case against *Oberregierungsrat* Hermann Lumm, accused of executing hostages in Lvov in July 1941, on the grounds that it had not been adequately proved that he was aware of the illegality of his actions. In the opinion of the court, the defendant's case that he had considered these executions as reprisals permitted by international law had not been rebutted. Since Lumm had made such a study of international law, he must surely have been familiar with Article 50 of the Fourth Hague Convention of 1907:

> No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

The shooting of hostages is in obvious violation of this rule.

Ad 2:

Were the Nazi criminals, in carrying out unlawful orders, acting under duress or in conditions of unavoidable necessity?

Under §52.1 of the criminal code, no offence has been committed by a person compelled to act under the pressure

of irresistible physical coercion or threats causing an immediate and otherwise unavoidable danger to the body or life of himself or his kin.

Defendants sometimes plead that they executed criminal orders out of fear for their lives. Their testimony, however, does not indicate that they were compelled to kill by force or threats, which are the conditions required by §52 of the code to excuse their actions. As a result, their line of defence is usually a plea of unavoidable necessity, invoking §54 which says:

> There is no offence if an act was committed, over and above cases of self-defence, in a condition of unavoidable necessity, for which the perpetrator was not responsible, to save himself or his kin from an immediate risk to body or life.

Thus, a situation defined as unavoidable necessity has to meet one of two conditions: danger to life (the threat of death) or to body (the threat of injury to health). It is not fulfilled by a danger to other goods such as property or personal liberty. In addition, the danger must be immediate [5] — that is, it must be present at the moment the act is committed. A danger that may arise in the future does not suffice to create unavoidable necessity. Fear of the possible consequences of failure to carry out orders does not, therefore, warrant application of §54. Though refusal might entail penal or disciplinary sanctions, punishment could only ensue after the necessary proceedings had been gone through, and hence the consequence of non-compliance, however severe they might be, would be removed in time from the moment in which the criminal order was to be implemented. This circumstance in itself rules out unavoidable necessity, since the risk was not concomitant with the act.

[5] *gegenwärtig* in the original.

The next question is whether the danger which the perpetrator wanted to avoid threatened his life or health. What consequences could there be of refusing to perform an order? For an answer let us turn to the persons best qualified to judge: high-ranking SS officers. In the trial of Dr Otto Bradfish (accused of executing 23,000 Jews in Białystok), former Lieutenant-General of the SS Bruno Streckenbach testified that members of the SS who refused to shoot Jews did not run the risk of death. The worst that could happen to them was transfer to the front. Evidence by former General of the SS von dem Bach-Zelewski to a court in Koblenz made the same point.

In war crimes trials, the courts frequently call experts to give an opinion on whether members of the SS were, while carrying out orders, acting in a state of unavoidable necessity. Dr Hans Günther Seraphim of Göttingen, who has appeared in more than fifty such cases as an expert, attests that he does not know of a single sentence being passed on, or even a charge being preferred against, an SS-man for failure to execute an order to kill. He has given a number of examples of such refusals.[6] Hermann Langbein quotes several more. For instance:

Dr Nikolaus Hornig, a witness in the Lumm trial, testified that in November 1941 he had refused to shoot some Soviet POWs. For this, he was sent to a concentration camp and subsequently sentenced to six years imprisonment by a court martial. In actual fact he was punished, not for failing to obey orders, but for conduct to the prejudice of discipline, since he criticized the orders in the presence of a group of soldiers.

[6] Langbein, op. cit., p. 60.

Colonel Griese of the *Schutzpolizei* refused to detail two of his companies for executions of Jews. A written complaint was lodged against him, but no action was taken on it; in fact Griese was soon afterwards given the Knight's Cross of the Iron Cross.

In Sachsenhausen, an SS NCO, *Unterscharführer* Palmier, balked at taking part in the killing of prisoners. As a result, he was transferred, but without any other consequences. Nothing happened either to *SS-Obersturmführer* Richter, a camp doctor in Gross-Rosen who had scruples about giving lethal injections.

The most cogent example, however, is that of Lieutenant Dr Albert Battel, who on 26 July 1942 had his men picket a bridge in Przemyśl to prevent the SS from carrying out an execution of Jews. He even gave orders to shoot if they tried to cross. In this way he succeeded in frustrating the atrocity — unfortunately for only a day. The furious commander of the SS unit complained directly to Himmler who asked for a report. The only consequence was that Dr Battel was reprimanded and transferred to the front.

These facts, and the opinions of court experts, belie the existence of a danger to life or health in the event of refusal to comply with criminal orders. Thus, there are no grounds for presuming a state of unavoidable necessity within the meaning of the act.

Dr Seraphim has some revealing comments on the real sources of obedience. It was continually drummed into the members of the SS, he argues, that they formed a social élite which could be entrusted with the most arduous tasks, even those which normally went against the grain. This is a specific Teutonic virtue summed up in the word "tough". Refusal to obey orders was not, therefore, regarded as a

betrayal of the ideals of the SS, but as chicken-heartedness. As a result, it was not considered to merit punishment, let alone death. Himmler made it clear that physical destruction of Hitler's enemies was a token of the exceptional strength of character and mind needed in the SS. For a real SS-man, orders to kill were bound to be objectively justified even if inwardly he jibbed at them. At the same time, those who took part in operations of this kind should regard them as a distinction, an exceptional assignment reserved for the élite.

This seems to hit the nail on the head. Dr Seraphim's view is, for that matter, corroborated by observations in court. At Ulm, the defendants' plea of unavoidable necessity was dismissed by the bench which declared in its judgment:

> If someone took part in an operation of these dimensions — the murder of over 5,000 Jews in Lithuania — against his will, he would be pursued and haunted by it all his life. But the defendants had themselves photographed during the executions, sometimes even striking swaggering poses, they took pictures of half-naked women about to be shot, and afterwards they threw parties paid for by the victims' money. This is not the conduct of a man faced by a moral conflict. It is the image of a ruthless butcher.

The "virtue of toughness" was instilled into the functionaries of Hitler's executive apparatus from the moment his system came to power. On 1 October 1933, Colonel Eicke of the SS, then commandant of Dachau, issued instructions on camp discipline, which prescribed incredibly harsh and degrading punishments for even the most trivial misdemeanours. The motto was: "Leniency is a sign of weakness". Throughout the history of the concentration camps, this precept was observed with a vengeance.

Compliance with criminal orders was not a result of a coercive situation but sprang from acceptance of inhuman rules of behaviour and contempt for weakness. What, as Nazi

criminals in the dock cravenly take cover behind a defence of unavoidable necessity, has now become of that strenuously cultivated strength of character?

Of course, in certain cases adoption of a milder qualification or admission of exceptional circumstances may be justified; but it should not be the rule. Justice requires restoration of a sense of proportion in the practice of West German courts. Their judgments show a far-reaching permissiveness with regard to Nazi criminals and their deeds.

C H A P T E R X

MITIGATING CIRCUMSTANCES

Another of the devices used in defence of Nazi criminals are pleas of what are called mitigating circumstances. In passing sentence, the court takes into consideration a number of contingencies bearing upon both the offence and the offender. It weighs the social harmfulness of the act, its frequency, its consequences, the defendant's behaviour at the time, his record, his regret or lack of it, his mental development. There are also wholly objective factors, unrelated to the crime itself or the character of its perpetrator, to be taken into account: for example, a lapse of time between commission and trial which is presumed to blunt the offence and to have worked towards the reform of the offender.

The question of mitigating or aggravating circumstances arises only where the law provides for a maximum and minimum pernalty. Where there is a single mandatory sen-

tence — such as life imprisonment in the case of murder (§211) — these factors are irrelevant.

As we have seen, Nazi criminals are usually condemned by West German courts as accessories to murder (84 per cent. of all convictions in cases involving mass murder). Given such a verdict, the severity of the sentence is at the discretion of the bench, except that it must not be less than three years. The majority gravitate close to this lower limit, which indicates that mitigating circumstances have been acknowledged in the actions of the defendants.

One of the recurrent arguments for mitigating sentence used by West German courts is the considerable time that has elapsed since the offence was committed. In their judgment, the years that separate the criminal from his crime have turned him into a different person, no longer a threat to the rule of law. The defendants have led normal lives since the end of war, have worked in various respectable occupations and have discharged their duties properly. Since they have taken their ordinary place in the community, punishment has no rehabilitating function to perform. Nor is it relevant as a deterrent, the courts claim, since there can be no repetition of the Nazi period, and hence there is no need to warn off other Germans from contemplating crimes of this kind. Much is made of the exceptional nature of these atrocities, held to be a product of specific political and social relations that swayed men's conduct. In the case of Hülsdünker, Knop and Wenzel, accused of the murder of 322 people in Berdichev in the Soviet Union, a West Berlin court in March 1960 expressed the view that a recurrence of Nazi crimes in the Federal Republic was out of the question.

Occasionally, the courts come up with extenuation along somewhat different lines. The defendants at Ulm were partially excused on the grounds of

a general belief among the German people in authority which is the result of centuries of upbringing.

The implications of this sweeping assertion are startling. If respect for authority is a national — not an individual — characteristic, then we should have to admit that all Germans are capable of committing the worst crimes if demanded by an authoritarian government; the fact that some of them have nothing on their conscience is purely accidental. This conclusion is indeed implicit in a number of trial verdicts. A jury court in Münster, for instance, hearing the case of Paul Johann Kremer, a camp doctor in Auschwitz, in November 1960 stated that he would have had nothing to answer for had he not been placed in a situation which had the makings of the crimes he subsequently committed. He had become a criminal through circumstances beyond his control.

Wholesale knuckling under to authority, even where it is a medium of lawlessness, is a preposterous assumption. If "a belief in authority" is an attribute of the Germans, another feature commonly ascribed to them is deference to law. Where these two claims collided, a choice had to be made. The law must, however, take precedence over even the most powerful and persuasive authority. The mitigating circumstance of ingrained obedience is more than offset by the aggravating one of contempt for law.

In the case of war criminals, the question of mitigating circumstances must be viewed in a special light. These trials are, after all, one of the means of "overcoming the past", whose residues still besmirch so many areas of West German life. It is no coincidence, for instance, that the most fervent champions of the Nazi criminals are the revisionists. Their mouthpiece, the *Deutsche National Zeitung und Soldaten-*

Zeitung, peddles not only territorial claims but also demands for a general amnesty for Nazi criminals, not only outrageous charges against the Allies but also commiseration with the Auschwitz criminals whose lives may be ruined by the trial in Frankfurt. The mentalities and activity of a part of the West German community hardly justify the optimism of the courts. Nor is it supported by the behaviour of most of the criminals themselves. The Auschwitz trial has made it abundantly clear that the posture of the defendants has lost little of its arrogance and swagger; they treat their presence in the dock as a ridiculous misunderstanding. Witnesses' stories of the incredible brutality and viciousness of the Auschwitz guards are heard with stony indifference as if they concerned someone else. Time has not seen any change in the criminals' mental or moral make-up.

What extenuation can there be in the fact that Nazi criminals are standing trial so late in the day as a result of the dilatoriness of West German law? Or in the fact that by hiding under false names and wiping out the traces of their crimes they have succeeded in staving off justice for so many years?

Indeed, can any of the pleas made in their defence stand up against the enormity of their offences? If the mitigating and the aggravating circumstances were put on the scales, it is obvious which would be the weightier. In the trial of Alfred Filbert in May-June 1962, the court in West Berlin also ruled that the infliction of a severe penalty was not required by the interests of deterrence, yet it sentenced him for life. It is worth noting in passing that of the 110 trials held before the West German courts in 1958-63 this was the only case in which the maximum penalty was imposed on a defendant found guilty of being only an "accessory".

Apparently, Filbert's 11,000 victims spoke for themselves. Other courts have been less sensitive to numbers. Dr Bradfisch, convicted in Munich of complicity in the murder of 15,000, was sentenced to 10 years. The mitigating factor was the court's deciding that since 1945 he had been a "decent man". It looks, in fact, as if there is a fundamental fallacy and confusion of terms involved here. The metamorphosis of a murderer into an upright businessman or conscientious civil servant does not necessarily betoken a change in his character. Various forms of behaviour are imposed by practical circumstances and by the complexities of human nature. Psychological incongruities were a particular characteristic of Nazi criminals. It has become almost a commonplace to hear of SS men who were inordinately savage in their treatment of human beings and at the same time the most devoted animal-lovers. But these features do not cancel out. We cannot say: the accused has admittedly murdered thousands of people but, on the other hand, he's been a good man since.

The question of the factors affecting sentence has still to be resolved in Supreme Court rulings. The *Bundesgerichtshof* has not yet taken on this point a specific line which could serve as guidance to the lower courts. This has raised further difficulties in the punishment of Nazi criminals.

CHAPTER XI

EXTRADITION OF WAR CRIMINALS

Under the terms of the Moscow Declaration signed by the Allied Powers on 30 October 1943, the signatories pledged themselves to extradite war criminals in their custody to those countries where their crimes had been committed. The relative clause in the Declaration read:

> At the time of the granting of any armistice to any Government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those liberated countries and of the Free Governments which will be erected therein. Lists will be compiled in all possible detail from all these countries having regard especially to the invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece including Crete and other islands, to Norway, Denmark, the Netherlands, Belgium, Luxemburg, France and Italy. Thus

> Germans who take part in wholesale shootings of Polish officers or in the execution of French, Dutch, Belgian or Norwegian hostages or of Cretan peasants, or who have shared in the slaughters inflicted on the people of Poland or in the territories of the Soviet Union which are now being swept clear of the enemy, will know that they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied Powers will pursue them to the uttermost ends of the earth and will deliver them to the accusers in order that justice may be done.

The principle expressed in the Moscow Declaration was confirmed by the London Agreement concluded on 8 August 1945 and was eventually incorporated in Article IV of Law No. 10 of the Allied Control Council issued on 20 December 1945. By virtue of this clause,

> When any person in a Zone of Germany is alleged to have committed a crime... in a country other than Germany or in another Zone, the Government of that nation or the Commander of the latter Zone, as the case may be, may request the Commander of the Zone in which the person is located for his arrest and delivery for trial to the country or Zone in which the crime was committed.
>
> Such request for delivery shall be granted by the Commander receiving it unless he believes such person is wanted for trial or as a witness by an International Military Tribunal, or in Germany, or in a nation other than the one making the request...

The Polish authorities submitted the names of some 7,000 Nazis for the list of war criminals compiled by the United Nations War Crimes Commission. Any such entry, accepted only after evidence of guilt had been carefully examined, was sufficient to obtain an extradition order.

The United Nations War Crimes Commission was dis-

solved towards the end of 1947, which prevented Poland from forwarding the names of another 5,000 persons evidence of whose criminal activities had been collected by the Central Commission for the Investigation of Nazi Crimes in Poland. But even from among the 7,000 criminals already registered, extradition orders were obtained for only 1,800.[1] From the spring of 1947 the Western occupation authorities began to resort to various excuses — usually on the grounds of some minor technicality — for refusing applications for extradition. In the event of failing to find any excuse, they deferred a decision indefinitely without giving any reason. From 1 November 1947 onwards, extraditions from the American occupation zone were reduced to strictly special cases, which virtually amounted to a suspension of surrender of war criminals.

At the request of the United States authorities, the Polish Military Mission for the Prosecution of War Crimes in the American Zone was recalled early in 1948. At about the same time some 580 requests for extradition submitted by Poland were turned down by the Americans.

Similar difficulties were encountered in the British zone. In January 1948, a permit given earlier for the extradition of 82 Nazi war criminals to Poland was cancelled by the British authorities, and on 24 February 1948 a special Extradition Tribunal was set up in Hamburg to carry out inquiries and collect evidence, although the names of the persons involved had already been entered on the war criminals list of the United Nations Commission. The investigations of the Tribunal were pursued without the participation of representatives of the countries concerned, and

[1] Data of the Central Commission for the Investigation of Nazi Crimes in Poland.

whether the object of this procedure was to put an end to extradition or not, this was certainly its effect. On 1 September 1948 the Military Commander of the British Zone of Occupation officially advised discontinuance of the delivery of war criminals to Poland, with the exception of those liable to a charge of murder under §211 of the German penal code. In 1949, only a handful of criminals were extradited to Poland, and in the middle of 1950 the Polish Military Mission for the Prosecution of War Crimes was also recalled from the British Zone of Occupation.

Since the establishment of the German Federal Republic in 1949, not a single war criminal has been surrendered to Poland; the wanted men included notorious murderers of thousands of people, among them the following Nazis:

1. General of the SS and Police Erich von dem Bach-Zelewski, responsible for the crimes committed during the Warsaw Uprising of 1944 and for the destruction of Warsaw;
2. General of the SS Heinz Reinefarth, responsible for massacres of the people of Warsaw during the 1944 Uprising; [2]
3. Wilhelm Koppe, SS and Police Commander in "Warteland" and the "Generalgouvernement";
4. *SS-Standartenführer* Otto Hahn, *Gestapo* Chief in Warsaw;
5. *SS-Sturmbannführer* Hermann Krumey, one of Eichmann's associates;
6. O. Helwig, SS and Police Commander in Białystok district;
7. W. Huppenkothen, *Gestapo* Chief in Cracow and Lublin, responsible for mass murders.

[2] At the time the application for his extradition to Poland was handed in, Reinefarth held the post of mayor of Westerland in the isle of Sylt.

The suspension of the extradition of Nazi war criminals, infringing as it did on earlier agreements and on Law No. 10, led to a number of interventions by the Polish Military Mission in Germany and by the Polish delegate to the United Nations War Crimes Commission, but without effect.

A law passed in Poland on 27 April 1964 ruled that the statute of limitations would be waived in the case of those Nazi criminals whose extradition had been unsuccessfully sought by the Polish authorities and most of whom are living in the German Federal Republic.

C H A P T E R XII

STATUTE OF LIMITATIONS

In preceding chapters we discussed the shocking dilatoriness displayed by the West German authorities in prosecuting Nazi criminals and the astounding lenience of West German court verdicts. What had been anxieties turned into a powerful wave of protests by international opinion following the Federal Government's decision to desist after 8 May 1965 from opening any fresh proceedings against persons suspected of having committed murder under the Nazi régime. The prospect of murderers of hundreds and thousands of people — criminals who had either succeeded in hiding themselves or had never been prosecuted — being allowed to make an open and uninhibited entry on the West German social, cultural and political scene offended the innate human sense of justice.

The Bonn Cabinet's decision, taken in November 1964, had its roots in the earlier abandonment of the very concept of

"Nazi crimes" as covering war crimes, crimes against peace and crimes against humanity and as defined in specific legal regulations — a step which amounted to treating such crimes on a par with ordinary criminal offences. As a consequence, old legal provisions, totally incommensurate with the nature and dimensions of Nazi crimes, were applied to them; this was the case with the German penal code of 1871 (with subsequent revisions) which laid down a time limit on the prosecution of crime.

Even in 1960, the Federal Government had seen fit to apply to Nazi criminals the 15-year limit on manslaughter proceedings. This decision had been taken over the opposition of the Social Democratic parliamentary group whose draft bill proposing a prolongation of the statute of limitations was turned down at a meeting of the Cabinet on 6 May 1960.

Thus, even then some Nazi criminals were granted impunity under the cloak of law. Since 1960, it has been possible to open fresh proceedings only on charges of murder.

In a statement made on behalf of the Government on 11 November 1964,[1] the State Secretary in the Federal Press Office, Herr von Hase, declared that 8 May 1945 was the starting date for the statute of limitations in the case of Nazi crimes and that any extension of the 20-year deadline for murder cases would contravene Article 103 section 2 of the Basic Law, or Constitution, of the Federal Republic which forbade retroactive legislation.

At the same time, the view was expressed in official circles in Bonn that by 8 May 1965 — that is, within a period of less than six months — the pursuit of Nazi criminals would be so advanced that only a handful of offenders would

[1] *Bulletin des Presse- und Informationsamtes der Bundesregierung*, 13 November 1964.

manage to escape justice. This was, of course, hardly credible in view of the vast numbers of crimes as yet unexplored and of the manner in which earlier prosecutions had been conducted.

A few days later, the Federal Government appealed to "governments, organizations and individuals at home and abroad" to submit any evidence they might have concerning hitherto unknown criminals which might serve in suspending the time limit in individual cases. The imminence of the May 1965 deadline and the remarkable reluctance, shown by the West German judiciary in the preceding period, to use incriminating materials in the possession of other countries, in particular those in Eastern Europe, resulted in this appeal being generally interpreted as a ruse designed to shift the responsibility on to other governments.

The origin of the date of 8 May 1965 as the deadline for the prosecution of Nazi murderers seems worth recalling in this connnection.

Under §67 of the West German penal code, prosecution of crimes liable to life imprisonment lapses 20 years after they were committed, though it is the date of the act, and not of its consequences, which is taken as the starting-point. Nazi crimes took place from the moment Hitler came to power, but they reached a sustained peak in the course of the war. If the rules of the code were followed to the letter, prosecution for the majority of these crimes would by now be statute-barred. Obviously, however, it was not until the defeat of the Third Reich that any kind of action could be taken against Nazi criminals. As a result, an exception had to be made to the rule that the term of the statute of limitations begins on the day the crime was committed, and a new principle adopted because of the fact that certain

criminal acts were not regarded as crimes during the Nazi period, while others were not prosecuted for political reasons.

Accordingly, under Law No. 10, the Allied Control Council suspended the statute of limitations for the period between 30 January 1933 and 1 July 1945. The West German authorities, on the other hand, in repealing Law No. 10 after the assumption of the full powers of prosecution by the country's courts, set 8 May 1945 as the opening date for the limitation period.

They did so on the presumption that on that date all the obstacles to the prosecution of Nazi criminals had been removed. This, of course, had not been so: it was hardly feasible to initiate any proceedings on the very next day after the end of hostilities.

The Federal Government's statement of 11 November 1964 provoked vigorous protests all over the world.

Those protests were an expression of moral indignation over the prospect of criminals guilty of genocide getting off scot-free. It was felt that the application of the statute of limitations to Nazi crimes would be tantamount to a bonus for those who had managed to escape just retribution throughout the twenty post-war years by hiding either in West Germany itself or in other countries. It would amount to a bonus also for their friends and protectors.

It was pointed out that, under the pretext of respect for the letter of the law, the Federal Government was aiming at making a mockery of what is the foundation of all law — justice. The belief was widely held also that in taking this stand the West German leaders were guided by a desire to win votes in the forthcoming parliamentary elections.

In addition, a number of legal objections were raised to the arguments advanced by the Federal Government.

It was indicated that one of the features of Nazi crimes had been that they were to a large degree violations of international law. The punishment of such crimes had been stipulated in acts of international law,[2] and under international law there was no time limit for the prosecution of crime. These acts were binding on the Federal Republic just as on any other country. The internal law of no country could contravene international law. And, in fact, under Article 25 of the Federal German Constitution, the rules of international law formed part of the law of the Federal Republic and took precedence over internal law. Any limitation provisions must be approached from the point of view of their compatibility with international law. And since the international legal acts concerning the prosecution of Nazi crimes did not set any time limit on prosecution, the Federal Republic had no right to apply the statute of limitations to such crimes. Every country was bound to abide by internationally-accepted norms in good faith, and it was incumbent on it in particular to harmonize its own internal legislation with the international agreements to which it had adhered. This constituted no restriction on national sovereignty.

Among Polish jurists, this theory has been pressed by Professor Alfons Klafkowski.[3]

It is a view shared in the German Democratic Republic. Nazi criminals are charged there under sections (b) and (c) of Article 6 of the Charter of the International Military Tribunal taken in conjunction with Article 5 of the Republic's Constitution and the relevant sections of the criminal

[2] See Chapter I.

[3] See "Ściganie zbrodniarzy hitlerowskich jako problem prawa międzynarodowego" [Prosecution of Nazi Criminals as a Problem of International Law], *Prawo i Życie*, Warsaw, No. 12, 1964.

code. It is explicitly stated in the Constitution of the German Democratic Republic (Article 5 §1) that

> the generally recognized rules of International Law are binding upon the State authorities and every citizen

and (Article 144 §2) that

> freedom and constitutional rights cannot impugn the decisions which have been and will be taken to combat national socialism and militarism and to redress the wrongs done by them.

Thus, the statute of limitations embodied in German criminal law is overridden by these supreme rules of international law. Nevertheless, on 1 September 1964 the People's Chamber of the German Democratic Republic passed a bill waiving the statute specifically in the case of war crimes.

The constitutional position in the German Federal Republic is similar.

Further, it was emphasized that the concept of limitation was unknown to the internal laws of many countries. It was certainly not applied in cases of murder in the Anglo-Saxon countries. Then also, even if the 20-year deadline was to be kept, there was no reason for it to run from 8 May 1945. It should not be forgotten that, initially, complete jurisdiction over Nazi criminals was in the exclusive hands of the occupying powers. The prerogatives of the German courts were limited, and they were not established automatically by law. Section 1(d) of Article III of Law No. 10 stated that a German court might try war criminals if authorized by the occupation authorities. The practice as regards such authorization varied. In the United States zone, it was granted in particular cases. In the British zone, a general authorization was issued on 30 August 1946. In the French

zone, this did not take place until 1 June 1950. Until their jurisdiction was recognized, the German courts could not administer justice even in a limited degree. In 1945, authorization to try cases of Nazi crimes was not given to any German court. Since German administration of justice was in abeyance, the term of the statute of limitations could not run from 8 May 1945 — in accordance with §69 (1) of the criminal code which provided for its suspension for any period in which the courts were unable to exercise their functions.

As regards Nazi crimes, this principle had been upheld by a ruling of the *Bundesgerichtshof* (*BGHSt* 1, 84; and 2, 54) to the effect that the term of limitation began at the earliest on the day the relevant German courts resumed operation. Referring to this ruling, Professor Jürgen Baumann [4] had argued that in each individual case it should be established when the court under whose jurisdiction the offender came had begun to function and when it had been invested with powers to try Nazi criminals. It was only from that date that the term of limitation could begin to run.

The subsequent extension of the jurisdiction of the German courts was linked with the question of limitation on crimes committed against citizens of the United Nations. Powers to try such offences had been granted only on 25 November 1949 under Law No. 13 of the Allied High Commission. The absence of authorization before that date was an obstacle the effect of which ought to be a suspension of limitation.

It might also be argued that it was not until 1955, when the Paris Treaties came into force and the Federal Republic acquired full sovereignty, that the German justiciary were

[4] Henkys, op. cit., p. 278.

invested with unlimited powers to prosecute Nazi criminals. The previous constraints had been tantamount to a suspension of the administration of justice, and thus the term of limitation could not run in this period.

What is the date that should be acknowledged as marking the resumption of the activity of the German courts is arguable; that it is not 8 May 1945 is beyond dispute. At that time, proceedings against Nazi criminals were neither legally nor practically feasible; thus, it cannot be taken as the beginning of the term of limitation.

Finally, the Federal Government's contention was rejected that an extension of the time limit would be contrary to Article 103 of the country's Basic Law. The legal arguments adduced by Herr von Hase seemed highly dubious.

Section 2 of the Article in question reads:

> An act may be liable to punishment only if it carried a statutory penalty prior to its commission.

This is, therefore, a simple affirmation of the principle *nulla poena sine lege*, also to be found in section 1 of §2 of the German criminal code.

It is accepted in both judicial practice and theory that the rule against retroactive legislation applies only to material and not to procedural law. The question that had to be answered, therefore, was whether the statute of limitations was one or the other. Modern jurisprudence tends to regard it either as of a wholly procedural nature or else as a compound in which procedural elements predominate. The general object of the institution of limitation is to guarantee the sureness of justice.

It is assumed in law that an offender is aware of the consequences of his act and that he must not be confounded by

the subsequent introduction of new legislation which would increase his responsibility and which might have deterred him from committing the crime had it been in force earlier. This argument is irrelevant to the operation of the statute of limitations. Although §67 of the criminal code defines the term of limitation as dependent on the gravity of the offence, the time limits are not unconditional. A crime does not invariably cease to be liable to prosecution after the lapse of time stipulated in the act. It is enough for a judge to examine a witness or the relevant evidence for the term of limitation to begin again (§68). In theory this renewal can continue *ad infinitum*. Under §69, the term is to be suspended for any period in which there were legal obstacles to the opening or continuation of proceedings. In such cases, it is extended by the length of time the obstruction existed. Thus, no criminal can be absolutely certain that he will be exempt from prosecution after the expiry of the deadline as stipulated in §67.

There is by and large a consensus today that the object of the statute of limitations is to assure legal protection within the sphere of procedural law. The longer the passage of time between the commission of an offence and its prosecution, the more difficult it is to assess the evidence and establish the facts and so the greater the danger of a miscarriage of justice. The statute of limitations is intended to forestall situations of this kind. It operates in the realm of procedural, not material law, since it does not impair the state's right to punish offenders, but merely puts a technical obstacle in the way of their prosecution. The statute does not cancel the offence or the penalty to which it is liable; it only prevents the criminal being brought to trial and the passing of a verdict. For these reasons the statement that an offence has become subject to the statute does not entail an

acquittal of the offender but a waiving of proceedings on negative grounds.

The Federal Ministry of Justice has also invoked the second sentence of §2 section 2 of the criminal code in support of its view. This states that, where there have been changes in the law between the time an offence was committed and its trial, the less severe rule should be applied. However, this clause has to be taken in context; it is qualified by the preceding sentence which says:

> Punishment shall be imposed according to the law binding at the time the act was committed.

Thus, the principle refers only to the penalty, not to the limitation of prosecution which has no bearing on it. The Ministry's extensive interpretation would in fact make nonsense of §69 of the code concerning suspension of the statute.

From the nature and object of the institution of limitation it follows that a statutory extension of the term would not violate the rule against retroactive legislation embodied in Article 103 section 2 of the Basic Law. Indeed this had been the view taken by the Federal Constitutional Court when it declared that Article 103 was no barrier to the passing of an act deferring expiry of the deadline with regard to acts already committed.[5] The same conclusion had been reached in the rulings of the *Bundesgerichtshof* (*BGHSt* 2, 305, and 4, 382).

The Bonn Government attempted to ignore the decision of the highest courts in the country and arrogate the right of impugning the binding interpretation of the law. Its sole authority was Dr Adolf Arndt, a legal expert of the Social Democratic opposition and deputy to the Bundestag, who

[5] See *Neue Juristische Wochenschrift*, 1953, p. 177.

maintained at the time that an extension of the 20-year deadline would encroach on Article 103.

Finally, nobody gave much credence to the Federal Government's assurances that by 8 May 1965 — within less than six months — it would be possible to open proceedings in all outstanding cases so as to meet the demand for the due punishment of virtually all Nazi murderers. Doubts were raised as to the Federal Government's sincerity in giving such assurances, and there were expressions of surprise that the head of the Ludwigsburg Office, Dr Schüle, himself should assert that only lesser criminals of the Nazi era were likely to escape prosecution. [6]

Foreign anxieties increased following a subsequent statement by none other but Dr Ewald Bucher, the Federal Minister of Justice, that

> we must accept that fact that we may have go on living with a few murderers.[7]

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* *

By early this year the indignation of foreign opinion over the trend of developments in West Germany had become so unmistakable that the Federal Government deemed it prudent to make concessions. Not that it now adopted an unequivocal attitude towards the question of the statute of limitations: it merely announced that this would be referred for decision to the Bundestag. In the view of most observers, this half-hearted measure was dictated by tactical considerations connected with the elections. Even so, when the former Chancellor, Dr Adenauer, went on record in favour of the starting date of the limitation period to be brought forward

[6] See *The Times*, 5 December 1964.
[7] Quoted after *The Times*, 19 January 1965.

by a few years, it was generally expected that something would at last be done.

The basis for the Bundestag discussions was to be a report by Dr Bucher, who persevered in his contention that any tampering with the statute of limitations was legally inadmissible and threatened that he would resign if the Government decided to extend the time limit.

The Minister's report was published early in March. It recorded a total of 80,000 convictions for Nazi crimes. The figures differed from those published earlier. [8] They exceeded several times those hitherto used by West German propagandists — probably because it was desired to prove that the number of undiscovered criminals was not worth speaking of.

One significant detail — which was subsequently raised during the debate in Parliament — was that the total of convictions by courts in the German Democratic Republic, as given by the Federal Minister of Justice, included, among other offenders, two persons who had been tried *in absentia* by East German courts — Dr Hans Globke, the *eminence grise* of Bonn throughout Dr Adenauer's chancellorship, and Dr Theodor Oberländer, the former Cabinet Minister and now Christian Democratic deputy to the Bundestag.

It was clear from the report that all the earlier official West German assurances that the prosecution of Nazi criminals had been virtually completed had no foundation in fact. Dr Bucher was compelled to admit that no full examination had yet been made of the abundant incriminating evidence contained in the archives of various foreign countries and that the possibility existed of hitherto un-

[5] See p. 18-9.

known crimes and criminals coming to light after 8 May 1965. The report laid bare the neglect of the West German judiciary in the investigation of Nazi crimes, one consequence of which was that only a few per cent. of the total number of convictions had been the work of West German judges, and that 72.3 percent. of the total had been sentenced before 31 December 1949 — that is, at a time when the share of the West German courts in the prosecution of such crimes had of necessity been limited.

On the day of the debate — 10 March 1965 — the public and press galleries of the Bundestag were filled to capacity as Dr Bucher (one-time recipient of a golden badge of the *Hitlerjugend*) rose to deliver his report and to speak about future proceedings against Nazi criminals. The Minister was uncompromising in reiterating his view that no extension of the deadline was possible. He declared that he was taking this stand to defend not crime but legality.

The Federal Government was determined not to commit itself either one way or the other — so much so that Chancellor Erhard and his colleagues did not occupy the Government benches, but took their seats together with the other deputies, and that no member of the Cabinet — Dr Bucher excepted — took the floor. The same Government, which — a few months earlier — had declared that all investigations had ben completed and that the statute of limitations was bound to come into effect next May, and which had changed its mind since, now failed to make its position clear.

The West German Government's attitude to the whole issue was certainly affected by considerations of internal politics. And so was that of the political parties and the Bundestag.

An opinion poll by the Wickert Institute of Tübingen showed that 63 per cent. of the men and 76 *per cent. of the* women in West Germany were against extending the statute of limitations. According to another poll, conducted on behalf of the *Süddeutscher Rundfunk,* 57 per cent. of the electorate *took this view. Sixty-five* per cent. of those questioned believed that the problem ought to be resolved without regard to foreign opinion.

It was also disclosed in Bonn that roughly 400 out of some 500 letters that had been addressed to the Bundestag about its pending debate on the statute of limitations opposed revision.

On the eve of the parliamentary debate on the statute of limitations in March 1965, members of the Bundestag received with their mail printed leaflets the text of which read:

> Deputies to the Bundestag who, obeying New York and Tel Aviv, shall vote against the statute of limitations applying to so-called "Nazi crimes" as of 8 May are sentenced to death by a valid verdict the moment they cast their votes. Responsible for execution: OBF [*Oberbrigadeführer* — Ed.] of Protective Area III.

While its importance must not be overestimated, this fact was certainly symptomatic.

The policy of glossing over and belittling crime and of blurring responsibility was bearing fruit. The great majority of West Germans have been shown to be in favour of finally freeing from blame the "idealists" whose trust and devotion were abused by Hitler — to borrow the formulation used by the chairman of the Christian Democratic parliamentary group during the March debate in the Bundestag.

In this situation, the Free Democratic Party — in its intransigence to stand by the 20-year deadline — could count on attracting the votes of nationalist elements. The CDU/CSU, as senior partner in the government coalition, had of necessity to reckon with international repercussions; it was, however, distinctly unwilling to risk alienating its supporters. This led to the decision to release the Christian Democrats in the Bundestag from party discipline in the forthcoming debate: everybody was allowed to vote as he wished. Only the Social Democratic opposition took a determined stand against the expiry of the statute of limitations.

A striking feature of the debate was the assertion made in virtually all the speeches that the proposals for the continued prosecution of Nazi crimes were dictated by a sense of justice of the German people themselves. Contrary to indisputable facts it was claimed from the Bundestag rostrum that it was the pressure of their own consciences rather than of foreign opinion that motivated the deputies in making their proposals.

How things really stood was, however, inadvertently revealed by the chairman of the Christian Democratic parliamentary group, Dr Rainer Barzel. In supporting the motion to abolish the statute of limitations, tabled by his colleague Dr Ernst Benda, Dr Barzel said he was guided by consideration for the adverse effect failure to do so would have on the Federal Republic's reputation abroad. He added that resentments were a political force to be reckoned with. However, Dr Barzel stated that his party was allowing its members a free vote on the matter.

The Bundestag had three motions before it:

(1) A motion by Dr Benda and 49 other Christian Democratic deputies to amend the country's penal code so that

there would be no time limit in future for any crimes punishable with life imprisonment — that is, murder and participation in murder;

(2) A motion by the entire Social Democratic parliamentary group, proposing an analogous amendment to the penal code coupled with an appropriate amendment to the Constitution; the latter would abolish the statute of limitations in cases of murder and genocide. The SPD believed that amending the Constitution was necessary so as to prevent the Federal Constitutional Court from being able in future to annul the legislation abolishing the statute of limitations; and

(3) A motion by the Bavarian CSU, based on the suggestion of ex-Chancellor Adenauer, to calculate the statutory limitation on opening murder proceedings from 1949 or 1955 instead of 1945.

In the course of the debate, all the by now familiar legal and moral arguments were adduced. The two opposing stands — for and against the statute of limitations — were based on either a demand for "legal security" or a call for justice.

The advocates of continued prosecutions of Nazi criminals drew attention to the omissions and shortcomings of earlier investigations; they criticized the tardiness of the judiciary in making use of the evidence collected in other countries, especially in the East. From the Bundestag rostrum were heard words full of dignity, showing an understanding of the moral and political aspects of the issue and indicating the legal possibilities of doing away with the statute of limitations. The opponents of any fresh proceedings after 8 May 1965 applied their ingeniousness to pointing out the alleged legal stumbling-blocks. Even so, the cham-

pions of "legal security" were obviously numerically inferior to those of justice.

The most passionate speech against the time limit was delivered by none other but the Social Democratic deputy Dr Adolf Arndt — the very man whose legal expertise had served the Government four months before in asserting the inadmissibility of any change in the statute of limitations.

Dr Arndt now declared that on this particular matter it was the heart that must speak, and that there should be no prevarication:

> ...the one [he said] who would seize a child by its legs and smash its head against the barrack wall... the one who would order the condemned to dig their own mass graves, and who would then kill them by shooting them in the back of their necks, was a murderer and remains a murderer to this day, and he must be punished.

Also Dr Benda, a representative of the younger generation of the CDU, spoke to his motion with warm conviction. He said that the granting of impunity to murder would amount to a breakdown of all sense of morality and justice:

> The honour of the German nation [Dr Benda stated] requires us to abolish limitation, and not — as some clamour — to put an end to trials. Our nation is not a nation of murderers and it must have the chance to free itself from murderers so that it should not be identified with them.

The debate ended with the Bundestag deciding on a show of hands to refer all the three motions to the parliamentary legal committee; this was instructed to submit a draft that would enable the continued prosecution of Nazi crimes after 8 May 1965. The FDP parliamentary group and some CDU/CSU deputies voted against the motions being passed

to committee — thus supporting the stand taken by Dr Bucher.

Summing up the debate, Professor Carlo Schmid, who was in the chair, declared:

> Today has been a day of glory for Parliament.

Unfortunately, the days of glory were not destined to last long.

Public opinion in many countries had followed the Bundestag debate with keen interest. Hopes had been raised — indeed, it seemed almost certain — that the rules of West German law would be revised and that the very principle of a time limit for Nazi crimes would be thrown overboard.

The hopes were soon dashed.

A warning signal came only two days later in the form of a verdict by a court in Munich acquitting 14 German nurses who had worked during the war in the hospital for the incurably sick at Obrawalde. They had been tried on the charge of complicity in the murder of their own patients within the framework of the Nazi euthanasia programme. The number of criminal acts of which they been accused ranged from several to more than two hundred. The defendants admitted having consciously administered poison, helped in making lethal injections and tried to persuade the sick to agree to treatment the effect of which — as the nurses knew — would be death; even so, they denied any guilt. They claimed that they had acted under orders, just as other officials, that it was a nurse's duty to obey her doctor, that this had been a time of war, that they regarded it all as legal, and — finally — that they had been afraid to refuse to take part in the killings. What exactly they had been afraid of was left unasaid.

The unprecedented nature of this acquittal consisted not in that a dozen or so old women escaped justice, but in that the act of a nurse killing her sick patient was considered by the court as not deserving punishment. The shock was all the greater for its having come so soon after the high-faluting words about pressures of conscience that had been bandied about in the Bundestag.

However, the main blow was yet to follow: on 25 March the Bundestag reconvened for its second debate on the statute of limitations.

A few days before it met, the results became known of the discussions in the legal committee over the motions tabled on 10 March. The committee had rejected the SPD proposal to abolish the statute of limitations for murder and to introduce an appropriate amendment to the Constitution. It had resolved to submit two motions to the plenary session:

(1) A modified version of Dr Benda's proposal, stipulating an extension of the deadline for murder cases by 10 years, Dr Benda having in the course of the discussions withdrawn the original motion, presented jointly with 49 of his CDU colleagues, for a general abolition of the time limit; and

(2) A proposal by Dr Max Güde, another CDU member and former state prosecutor-general,

(a) to bring forward the starting date for the statute of limitations from 8 May 1945 to 31 December 1949 — that is, to extend the deadline by four and a half years, and

(b) to recommend that the prosecutor's offices and the courts should suspend proceedings — including those already instituted — against lesser criminals who had been active in inferior positions or had acted "under orders".

The latter part of Dr Güde's proposal was, of course, a camouflaged amnesty for the majority of Nazi criminals, both those already apprehended and such as were still at large.

Even so, the bargaining behind the scenes continued so that the second debate in the Bundestag began with a delay.

The Social Democratic Party and its experts, Dr Arndt and Dr Jahn, gave up efforts to secure legislation that would do away with the statute of limitations altogether. Dr Benda, while expressing regret over the absence of the "unforgettable atmasphere" of 10 March, in turn withdrew his motion to extend the deadline by no more than 10 years.

The surprise of observers was dispelled by the news — subsequently confirmed by a spokesman for the Social Democratic group — that on the very same day in the morning the leaders of the CDU/CSU and SPD parliamentary groups had agreed that they would support the first part of Dr Güde's motion, and that they had been guided — as the official SPD communiqué put it — by a desire to obtain "as broad a basis as possible" for the final Bundestag decision.

Still, there was no unanimity. The Bill to continue prosecutions for another four and a half years was adopted by 364 votes against 96, with 4 abstentions.

No agreement was reached on the second part of Dr Güde's motion — perhaps because of the uneasiness felt over its possible repercussions. This was sent back to the legal committee for further examination. No date for a committee meeting was announced. Past experience would suggest that the provision in question will be adopted without undue publicity after the dust raised by the whole matter has settled down.

Thus, even though a profusion of noble-sounding phrases about conscience, justice and the need to "overcome the past" had been spoken, when the day of decision came, a shabby compromise was reached — with a sideway glance at the electorate.

On the day of the second Bundestag debate, the Federal Minister of Justice, Dr Ewald Bucher, handed in his resignation, declaring that Parliament's decision was legally unacceptable. He was the only man in Bonn to show consistency — and he showed it in fighting for an evil cause.

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Throughout the early stages of the controversy over the issue, nobody even referred to the crux of the matter — the unique character of Nazi crimes. All the time the issue was debated as if it were a question of prosecuting run-of-the--mill offences.

Last year, the recurring murders of taxi-drivers in West Germany prompted a public discussion of the possibility of restoring the death penalty and appropriately amending the Constitution. At the very same time, the German Federal Government and the country's principal political parties were saying that any extension of the time limit on the prosecution of Nazi crimes was out of the question.

A change in this attitude was only brought about by the angry reactions of foreign opinion. Only then intense repugnance was expressed and far-reaching proposals drafted. However, hardly had foreign opinion had the time to record these positive responses, the most modest of all possible solutions was opted for, while at the same time an amnesty was surreptitiously concocted. Assurances will certainly

follow now to the effect that the extension of the 20-year deadline does, after all, pave the way to bringing all the major criminals to book. Indeed, it may well be asserted in West Germany that as time passes — and as the offenders age and die out one by one — the whole matter will be becoming less and less pressing, and that those who refuse to rest content with an extension of the prosecution period until 1970 are driven by a desire for revenge and deny the possibility of a moral reform of the culpable and the need for forgiveness.

Such arguments will be proof that the essence of the problem has not been grasped even now. The question of the statute of limitations is not one restricted merely to the criminals themselves; it is a question also of those who ought to prosecute and punish them, as well as of the community in the midst of which the criminals live. It is not so much the future fate of the war criminals that matters, but the mentality of the West Germans. What is truly tragic is that — as a consequence of the decision taken by the Bundestag — young Germans will after 1970 live side by side with murderers and that they will know that Nazi crimes have been considered in their country as unworthy of being remembered.

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An answer to the question as to how did it happen that things worked out as they did must be sought in West Germany's failure to overcome its past.

Unfortunately, those responsible for the real meaning of the past not having been faced up to are not all to be found within the borders of the Federal Republic. As a writer in

the Hamburg *Die Zeit* has put it, there was a time when few people in the West showed any concern about it:

> When the cold war reached its climax, the question was asked how many divisions would the Germans be able to put up. Nobody asked if they had squared their accounts with the past. That was how the Federal Republic became a "fully-fledged member of the community of free nations" sooner than she could ever have expected. And it was just because the country had regained its place on the international scene with such apparent ease that its citizens were entitled to believe that it was enough to dissociate oneself from those years, enough to work for the new state, to be able to forget the past.[9]

The Bundestag decision has not detracted from the interest in the further prosecution of Nazi crimes. The responsibility is now again that of the judiciary.

So far, West German courts have shown themselves to be both dilatory and lenient. Will they now again engage in mock trials? The issue boils down to the simple question:

Do they want to punish Nazi criminals or not?

[9] Rolf Zundel, "Strich unter der Vergangenheit", *Die Zeit*, 19 March 1965.

PUBLISHER'S POSTSCRIPT

The Bundestag debates of March 1965 on the application of the statute of limitations to Nazi crimes of murder were preceded by a world-wide outburst of protests against the Federal Government's decision, taken in November 1964, to cease prosecuting Nazi criminals as of 8 May 1965.

Just about four months had elapsed between those two political events. Enough for the West German Government to find itself in complete isolation, face to face with a united world opinion. It will certainly not be an overstatement to say that the general public indignation over the prospect of Nazi murderers being left off scot-free reflected a revival of that splendid spirit that had animated the nations of the great anti-Nazi coalition during World War II.

The infamous plans to let the appalling crimes of genocide pass into oblivion twenty years after the war outraged the sense of justice of people.

An avalanche of protests swept the entire world. Country after country went on record against any time limit on the prosecution of Nazi crimes. Parliament after parliament adopted formal resolutions extending the deadline for prosecutions in their respective countries. Government after government drafted diplomatic notes or published declarations of protest.

The pressure was powerful enough for the Federal Government to realize in what utter isolation the disastrous November decision had placed it. It beat a retreat and passed on this all-important matter to the Bundestag to decide. No wonder that the March discussions in the West German Parliament were followed with keen interest. Significantly, no Federal Cabinet Minister took the floor — Dr Ewald Bucher, then Federal Minister of Justice and one of the most ardent champions of the statute of limitations applying to Nazi murderers, was the sole exception. Chancellor Erhard listened to the debate in silence, and so did his predecessor in office, Dr Adenauer, while the chairman of the CDU/CSU parliamentary group, Herr Rainer Barzel, who acted as the Union's principal spokesman, made a speech which the Paris Le Monde *described as "a masterpiece of demagogy and ill will". And although in the end the Bundestag resolved to put off the deadline on prosecutions by a few years, its decision was a far cry from any true squaring of accounts with the criminal past — a thing which the majority of Bundestag members had seemed willing to do on 10 March. The West German Parliament only retreated when confronted with the angry foreign protests roused by the ignominious scheme to secure impunity for Nazi murderers after 8 May 1965.*

The attempts made durnig the past few months to use the statute of limitations to protect Nazi criminals have thrown a searching beam of light on the ideological and personal links between present-day West Germany and its Third Reich antecedents. The results of the March debates in the Bundestag only serve in bringing out the apposite and topical nature of the present book.

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